(1)

85-516

No.

Supreme Court, U.S.
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In The

Supreme Court Of The United States

OCTOBER TERM, 1985

VERNICE DUBOSE, ET AL.,
Petitioners,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether in overturning an award of attorney's fees of $141,705 under the Equal Access to Justice Act, the court of appeals erred by reviewing *de novo* and reversing the district court's finding that the federal government's position on the merits was not "substantially justified."

2. Whether the Supreme Court's issuance of a stay and grants of certiorari without opinion in other closely related cases was a sufficient basis for the court of appeals to reverse the district court's finding that the federal government's position on the merits was not "substantially justified" when that position had previously been unanimously rejected by the district court along with many other courts nationwide and the eventual settlement on the merits awarded the petitioners all that they sought in the litigation.

LIST OF PARTIES IN THE COURT BELOW

VERNICE DUBOSE, SUSAN DAIGLE, individually and on behalf of all others similarly situated,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; WINDHAM HEIGHTS ASSOCIATES, a limited partnership; ANTHONY ASSOCIATES, a general partnership; and SIMON KONOVER, individually and in his official capacity as a general partner in Windham Heights Associates and Anthony Associates,
Respondents.

CLAUDIA WALTER and DOMINICK CORTESE, individually and on behalf of all other persons similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; CARABETTA ENTERPRISES, INC., a corporation organized and existing under the laws of the State of

Connecticut, located in the Town of Meriden, County of New Haven, State of Connecticut,

Respondents.

JANETTE LITTLE, individually and on behalf of all others similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; RICHARD BROWN, individually and in his capacity as part-owner of East Hartford Estates; OAK MANAGEMENT CO., INC., a Connecticut Corporation; LOUIS BROWN, individually and in his capacity as part-owner of East Hartford Estates,

Respondents.

CATHY ADAMS, SHEILA CAQETTE, BARBARA LITTLEJOHN and HAZEL FRENCH, individually and on behalf of all others similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; BRANFORD MANOR ASSOCIATES, BAY MANAGEMENT CORPORATION, MARVIN S. GOLD,

ANNETTE E.P. GOLD, MILTON A. BERNBLUM, JOHN J. GROVES, and BURTON LEVY, individually and as general partners in Branford Manor Associates,
Respondents.

MERRY ELLEN GRUNDMAN, individually and on behalf of all others similarly situated,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban Development; JOHN ERRICHETTI, individually and in his capacity as owner of Highwood Apartments; CREATIVE MANAGEMENT & REALTY, A Connecticut Corporation,
Respondents.

JOANN JOHNSON and FRANK JOHNSON, individually and on behalf of all others similarly situated,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary, U.S. Department of Housing and Urban Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development and RIPPS REALTY, INC.,
Respondents.

MAY PLEASANT, individually and on behalf of others similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., Secretary of the U.S Department of Housing and Urban Development; TUSCAN BROTHERHOOD HOMES, INC., A Connecticut corporation,
Respondents.

PANTALEON MORALES, YLDA LADSON and MARGARET WILLIAMS, individually and on behalf of those similarly situated;

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Petitioners,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development; CANTERBURY GARDENS COOPERATIVE, INC. and RIPPS REALTY, INC.,
Respondents.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Vernice Dubose, individually and on behalf of others similarly situated, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 14, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at 761 F.2d 913. The opinion of the District Court for the District of Connecticut is reported at 579 F. Supp. 937. Copies of both opinions appear in the separate Appendix along with copies of the five other reported District Court opinions in this case.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 14, 1985, reversing the judgment of the District Court dated February 7, 1984. The Court of Appeals denied a timely petition for rehearing on June 25, 1985. This petition for certiorari was therefore due on September 23, 1985 and was filed within the required time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Code, Title 12, §1715z-1(f)(3) and (g), the Operating Subsidy Legislation; and United States Code, Title 28, §2412, The Equal Access to Justice Act. As both provisions involved are lengthy, they are set forth verbatim in the separate Appendix.

STATEMENT OF THE CASE

This petition arises from the totally successful enforcement by lower income tenants of a Congressional program to provide special rental subsidy payments to inhabitants of federally subsidized housing projects. Petitioners seek review of reversal by the Court of Appeals for the Second Circuit of the trial court's award to them of $141,705 in attorney's fees under the Equal Access to Justice Act (EAJA), 24 U.S. Code §2412, Appendix V, p. 193.

On its merits, this case concerned the Section 236 housing program. 12 U.S.C. §1715z-1. Section 236 provides for mortgage insurance and interest reduction payments to private apartment project owners. In return, owners must rent primarily to lower income persons and families at reduced rates controlled by HUD. 12 U.S.C. §1715z-1(i)(2).

In 1974, in response to rapidly escalating Section 236 rents caused primarily by increased energy costs, Congress enacted the operating subsidy program, 12 U.S.C. §1715z-1(f)(3) and (g), (1976 ed.). Appendix V, p. 190. Claiming that the new statute gave HUD absolute discretion whether to implement the operating subsidy program at all, the Secretary refused to aid the lower income tenants.

In response to rent increase requests by owners of their projects, suits against HUD were filed in Maryland and Pennsylvania by Section 236 tenants seeking operating subsidies. Both courts ordered HUD to pay the subsidies. *Harrison v. Hills*, Civil No. 75-938 (W. D. Pa. Oct. 1, 1975); *Ross v. Community Services, Inc.*, 396 F. Supp. 278 (D. Md. 1975).

Soon thereafter, the United States District Court for the District of Connecticut issued a preliminary injunction against HUD. *Dubose v. Hills*, 405 F. Supp. 1277 (D. Conn. 1975), Appendix II, p. 75. Jurisdiction for this lawsuit was held to be properly founded upon 28 U.S. Code §§1337 and 1361. *Dubose v. Hills, supra*, 405 F. Supp. 1279-80. Appendix II, p. 76.

Though HUD proceeded to pay subsidies to tenants of the three projects then involved in *Dubose*, it continued to refuse to implement the program in Connecticut. On May 26, 1976, the district court issued a statewide injunction in behalf of lower income tenants residing in all 101 Connecticut Section 236 projects. *Dubose v. Hills*, 22 F.R. Serv. 2d 476 (D. Conn. 1976), Appendix II, p. 159. HUD appealed this statewide injunction to the Second Circuit which denied stays on June 28 and July 20, 1976. *Dubose v. Harris*, 434 F. Supp. 227, 229 (D. Conn. 1976), Appendix II, p. 153.

Meanwhile, several other U.S. district courts and two courts of appeal also rejected HUD's argument and issued or affirmed injunctions ordering HUD to pay. *Dubose v. Harris*, 82 F.R.D. 582, 585, n.12 (D. Conn. 1979), Appendix II, p. 144. Despite this flood of authority against HUD, plaintiffs nationwide and their attorneys still were left to attack HUD's intransigence piecemeal. Finally, a nationwide class action was filed and won. *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976). Already ongoing operating subsidy cases like *Dubose* were not subsumed within the nationwide class action.

For unstated reasons, the Supreme Court on October 18, 1976 stayed the order in the nationwide class action. *Hills v. Underwood*, 429 U.S. 892 (1976). Thereafter, also absent comment, this Court granted certiorari in two other similar cases. *Harris v. Ross*, 431 U.S. 928 (1977); *Harris v. Abrams*, 431 U.S. 928 (1977). The Second Circuit then followed the Supreme Court and stayed the district court's statewide injunctive order in this case. *Dubose v. Hills*, Nos. 76-8311 and 76-6107 (2d Cir. Dec. 27, 1976), Appendix II, p. 173. This Court declined to vacate the stay on February 22, 1977. 429 U.S. 1085 (1977).

Shortly thereafter, HUD and counsel in this case and the other three principal cases nationwide, *Underwood*, *Ross* and *Abrams*, initiated settlement negotiations. This resulted in a nationwide Settlement Agreement and Stipulation for Settlement. *Dubose v. Harris*, 82 F.R.D. 582, 592 (D. Conn. 1979),

Appendix II, p. 117. In approving the agreement, the District Court exclaimed, *inter alia*, that, ". . . it is extraordinary that [the tenants] have been able to procure this settlement." *Dubose v. Harris, supra*, 82 F.R.D. 589, Appendix II, p. 113. The exact same agreement approved in *Dubose* also governed the final outcomes of *Underwood, Ross* and *Abrams*.

While administration of the sixty million dollar nationwide settlement fund proceeded, plaintiffs in this case and in *Underwood* filed applications for attorney's fees under the EAJA. In the nationwide class action, one of the three other cases settled along with this one, the California district court awarded EAJA counsel fees to the plaintiffs. *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982). HUD appealed that fee determination to the Ninth Circuit Court of Appeals.

On February 7, 1984, the district court in this case issued its decision holding that petitioners were entitled to an award of fees totalling $141,705. *Dubose v. Pierce, supra*, 579 F. Supp. 937. (D. Conn. 1984), Appendix II, p. 20. The Secretary of HUD then appealed the trial court's fee award to the United States Court of Appeals for the Second Circuit.

On May 14, 1985, proceeding as a two judge panel under Second Circuit Rule 0.14, the Second Circuit reversed the district court's award of attorney's fees to petitioners. *Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1985). Appendix I, p. 2. The panel rejected the district court's finding that HUD's defense of this case on the merits was not "substantially justified" within the meaning of the EAJA. In so doing, it ignored "the unanimous rejection of the Secretary's claims by the federal judiciary." *Dubose v. Harris, supra*, 82 F.R.D. 582, 585, Appendix II, p. 108. The panel also paid short shrift to the settlement of the case in which tenants nationwide ultimately received all they had asked for in their complaints. The Second Circuit relied principally on this Court's issuance of the stay in *Underwood* and writs of certiorari in the *Ross* and *Abrams* cases in reversing the trial court's critical finding that HUD had not carried its burden of proving its position in the case was "substantially justified."

Nine days later, in *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985), Appendix III, p. 175, the Ninth Circuit affirmed the award of counsel fees to the *Underwood* plaintiffs. The affirmance of the *Underwood* fee decision has created a direct conflict between the Ninth and Second Circuits on the very same general matter and several important legal issues.

Petitioners seek a writ of certiorari so that this Court may resolve this conflict and provide needed clarification of the EAJA. This case presents an opportunity for this Court to insure that the crucial EAJA issue of whether governmental action was "substantially justified" will be determined consistently nationwide.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *UNDERWOOD V. PIERCE* REGARDING PROPER INTERPRETATION OF THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. §2412.

Both the *Dubose v. Pierce* and *Underwood v. Pierce* appeals were filed by HUD from adverse district court decisions awarding substantial attorney's fees to counsel for low income tenants under the EAJA. *Dubose* and *Underwood* were the most important of a series of suits filed nationally successfully challenging HUD's refusal to implement the Congressionally mandated operating subsidy. *Dubose* and *Underwood* were resolved together pursuant to the same sixty million dollar nationwide settlement. *Dubose* and *Underwood* involved identical issues of law and fact concerning HUD's illegal action.

In *Underwood*, the Ninth Circuit affirmed an award of attorney's fees holding that HUD's position was not "substantially justified" while the Second Circuit reversed the award of fees in this case. This conflict justifies the grant of certiorari to review the judgment below. ". . . [I]t is only the Supreme Court of the United States that can speak with authority to assure uniformity of federal law among the several circuits and districts." *United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 316, 320 (D.N.J. 1976)

2. THIS CONFLICT BETWEEN THE NINTH AND SECOND CIRCUITS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The EAJA is one of perhaps the two most significant federal attorney's fee shifting statutes, the other being the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S. Code §1988. The EAJA is so important in the Second Circuit that the court of

appeals has promulgated a special rule for petitioning for EAJA fees. Second Circuit Rule §0.25. The EAJA was recently reenacted and signed into law by the President on August 5, 1985. Equal Access to Justice Act, P.L.99-80.

Under the EAJA, 28 U.S. Code §2412(d)(1)(A), parties who prevail in civil suits against the federal government are entitled to counsel fees ". . . unless the court finds that the position of the United States was substantially justified . . ." The trial court found that HUD's position was not "substantially justified." The Second Circuit disagreed. In *Underwood*, the Ninth Circuit agreed with the trial court.

This conflict between the Second and Ninth Circuits is indicative of the disagreement among courts nationwide regarding the precise standards they should employ in determining whether government action is "substantially justified." In *Spencer v. N.L.R.B.*, 712 F.2d 539, 546 (D.C. Cir. 1983), the court of appeals noted that: "Because of its recent vintage, [the EAJA] has not yet acquired a discernible gloss of judicial interpretation. And, most importantly, several of its crucial terms are distressingly ambiguous. [T]wo of those terms – 'the position of the United States' and 'substantially justified' – loom large . . ." Petitioners suggest that this disagreement and ambiguity amount to . . . "an important question of federal law which has not been, but should be, settled by this Court . . ." Rules of the Supreme Court of the United States, Rule 17.1(c).

The conflict between *Dubose* and *Underwood* is not limited to their results. To arrive at those results, the Second Circuit and Ninth Circuits each used a distinctly different set of standards to determine whether HUD's position on the merits was "substantially justified." This Court needs to set forth a single set of standards for determining issues arising under the phrase in question so that future resolutions of EAJA controversies will be handled uniformly nationwide. This Court could meet that need by reviewing this case.

For example, the *Underwood* court of appeals held that "We review, for an abuse of discretion, the district court's determination that the government's position was not substantially justified." *Underwood v. Pierce, supra*, 761 F.2d 1346. Appendix III, p. 181. The Second Circuit, on the other hand, held that . . . "the district court's determination that HUD's position was not plausible should be viewed as a conclusion of law . . . and subject to *de novo* review." *Dubose v. Pierce, supra*, 761 F.2d 917. Appendix I, p. 11.

Also, the *Underwood* court of appeals concluded that prior adverse decisions from other courts in other jurisdictions on the same legal issue must bear heavily against the government's claim that its position was substantially justified. At 761 F.2d 1346, the Ninth Circuit noted that:

> Numerous courts in different districts had agreed with the tenants' contentions. The Secretary was thus put on notice that his position was without legal basis, but he continued to litigate the issue. (Appendix III, p. 181).

The Second Circuit, on the other hand, lightly dismissed those prior decisions as practically irrelevant:

> Although HUD's position became more questionable as adverse trial and appeal decisions accumulated, we cannot say that the tally ever became so one-sided as to render HUD's position clearly unjustifiable. *Dubose v. Pierce, supra*, 761 F.2d 918. (Appendix I, p. 14).

The Second Circuit even suggested that Second Circuit precedent against HUD's stance on the merits would not have caused it to conclude that the government's position was not "substantially justified," citing *Wyandotte Savings Bank v. N.L.R.B.*, 682 F.2d 119, 120 (6th Cir. 1982). *Dubose v. Pierce, supra*, 761 F.2d 919, Appendix I, p. 14.

Yet another example of the Second Circuit's conflict with the Ninth concerning the "substantially justified" review should be of special interest to this Court. While the Ninth Circuit dismissed this Court's entry of the stay in *Underwood* and grants of

certiorari in *Ross* and *Abrams* as having little or no bearing on the "substantially justified" question, the *Dubose* court seized on these events as a principal basis for concluding that HUD's position was "substantially justified." *Underwood v. Pierce, supra*, 761 F.2d 1346; Appendix III, p. 181. *Dubose v. Pierce, supra*, 761 F. 2d 919-20. Appendix I, p. 16.

Unless this case is reconsidered, a Supreme Court stay or writ of certiorari will act as an absolute bar to EAJA liability for attorney's fees in the Second Circuit. This same interpretation is possible in all other circuits but the Ninth because of its *Underwood* decision.

Petitioners are not aware of any definitive standard established by the Supreme Court for the granting of stays or certiorari that, in the absence of a written decision, would enable a lower court to discern the underlying reason(s) for the Court's action.

The Supreme Court's review of cases on *certiorari* "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Taking a factor into account does not constitute a controlling basis for determination.

This Court's written decisions on stays indicate that different standards are applied to different situations. *See, e.g., Heckler v. Blankenship*, _____ U.S. _____, 79 L. Ed. 2d 155, 157 (O'Connor, Circuit Justice, 1984) (granting stay); *M.I.C. Limited v. Bedford Township*, _____ U.S. _____, 77 L. Ed. 2d 1442 (Brennan, Circuit Justice, 1983) (granting stay); "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a Court of Appeals would be to protect this Court's power to entertain a petition for *certiorari*." *New York v. Kleppe*, 429 U.S. 1307, 1311 (Marshall, Circuit Justice, 1976).

The Second Circuit decision in this case is a departure from the accepted practice of not reading motives into the Supreme Court's issuance of stays and grants of certiorari. This petition presents an opportunity for this Court to establish what if any

precedential value is to be given to its action in issuing a stay or granting certiorari without written opinion and thus avoid the confusion and unnecessary litigation that could result from the assignment of motives and precedent to Supreme Court stays and grants of writs of certiorari.

The *Underwood* court of appeals gave substantial weight to the settlement of the cases in affirming the district court's decision that HUD's position was not "substantially justified":

> "We also note that the Secretary's insistence that the Court's [stay and certiorari] orders justified his position is undermined by the fact that, following entry of those orders, he entered into a settlement agreement granting the plaintiffs all the relief they had requested."
>
> *Underwood v. Pierce, supra,* 761 F.2d 1346. Appendix III, p. 182.

The *Dubose* court of appeals took a directly opposite stance:

> "Nor does the court's suggestion that the government's participation in the settlement represented an admission that the litigation was unjustified merit much analysis."
>
> *Dubose v. Pierce, supra,* 761 F.2d 920. Appendix I, p. 17.

Petitioners emphasize that this settlement was no compromise. Plaintiffs in the district court achieved total victory through the 60 million dollar agreement. In *Spencer v. N.L.R.B., supra,* 712 F.2d 555, n.58, the District of Columbia Court of Appeals concluded that:

> It seems clear that, if the government does not immediately accede to the plaintiff's demand, but instead initially opposes his claims and then at some later stage . . . surrenders, the United States will be liable for attorney's fees . . . For strong indications of

> Congress' intent that fees be awarded under these circumstances, see H.R. Rep. No. 1418, [96th Cong., 2d Sess.] at 11.

This maxim was ignored by the Second Circuit. The intent of Congress was unfulfilled. This Court should review this case so that Congressional intent and proper standards may govern uniformly the determination of attorney's fees under the EAJA.

The "substantially justified" question must be determined on the basis of the entire record or the totality of the circumstances in the case. 24 U.S.C. §2412(d)(1)(B), Appendix V, p. 194. As these circumstances appear, they raise legal issues whose determination by this Court would add needed specificity to the "substantially justified" standard and offer welcome guidance to the federal judiciary. There could not be a more appropriate case for the resolution of such issues of law than this long-term controversy encompassing nearly all imaginable circumstances in which six reported opinions have been authored by the district court. This case is the optimum means for nationwide clarification of the "substantially justified" standard by this Court.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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I. OPINION FOR WHICH REVIEW IS SOUGHT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 581, 582, 583 — August Term, 1984

(Argued: January 23, 1985 Decided: May 14, 1985)

Docket Nos. 84-6145, 84-6169, 84-6171, 85-6017

VERNICE DUBOSE, SUSAN DAIGLE, individually and on behalf of all other similarly situated,

Plaintiffs,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; WINDHAM HEIGHTS ASSOCIATES, a limited partnership; ANTHONY ASSOCIATES, a general partnership; and SIMON KONOVER, individually and in his official capacity as a general partner in Windham Heights Associates and Anthony Associates,

Defendants,

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development,

Defendant-Appellant-Cross-Appellee.

CLAUDIA WALTER and DOMINICK CORTESE, individually and on behalf of all other persons similarly situated,

Plaintiffs,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; CARABETTA ENTERPRISES, INC., a corporation organized and existing under the laws of the State of Connecticut, located in the Town of Meriden, County of New Haven, State of Connecticut,
Defendants,

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development,
Defendant-Appellant-Cross-Appellee.

JANETTE LITTLE, individually and on behalf of all others similarly situated,
Plaintiff,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,
Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; RICHARD BROWN, individually and in his capacity as part-owner of East Hartford Estates; OAK MANAGEMENT CO., INC., a Connecticut Corporation; LOUIS BROWN, individually and in his capacity as part-owner of East Hartford Estates,
Defendants,

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development,

Defendant-Appellant-Cross-Appellee.

MAY PLEASANT, individually and on behalf of others similarly situated,

Plaintiff,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., Secretary of the U.S. Department of Housing and Urban Development; TUSCAN BROTHERHOOD HOMES, INC., A Connecticut corporation,

Defendants,

SAMUEL R. PIERCE, JR., Secretary of the U.S. Department of Housing and Urban Development,

Defendant-Appellant-Cross-Appellee.

PANTALEON MORALES, YLDA LADSON and MARGARET WILLIAMS, individually and on behalf of those similarly situated,

Plaintiffs,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban

Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development; CANTERBURY GARDENS COOPERATIVE, INC., and RIPPS REALTY, INC.,

Defendants,

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development.

Defendants-Appellants-Cross-Appellees.

CATHY ADAMS, SHEILA CAQETTE, BARBARA LITTLEJOHN and HAZEL FRENCH, individually and on behalf of all others similarly situated,

Plaintiffs,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; BRANFORD MANOR ASSOCIATES, BAY MANAGEMENT CORPORATION, MARVIN S. GOLD, ANNETTE E.P. GOLD, MILTON A. BERNBLUM, JOHN J. GROVES, and BURTON LEVY, individually and as general partners in Branford Manor Associates,

Defendants,

SAMUEL R. PIERCE, JR., individually and in his official capacity as Secretary of the U.S. Department of Housing and Urban Development,

Defendant-Appellant-Cross-Appellee.

MERRY ELLEN GRUNDMAN, individually and on behalf of all others similarly situated,

Plaintiff,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban Development; JOHN ERRICHETT, individually and in his capacity as owner of Highwood Apartments; CREATIVE MANAGEMENT & REALTY, A Connecticut Corporation,

Defendants,

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary of the U.S. Department of Housing and Urban Development,

Defendant-Appellant-Cross-Appellee.

JOANN JOHNSON and FRANK JACKSON, individually and on behalf of all others similarly situated,

Plaintiffs,

CONNECTICUT LEGAL SERVICES, INC., SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES,

Appellees-Cross-Appellants,

v.

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary, U.S. Department of Housing and Urban Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development and RIPPS REALTY, INC.,

Defendants,

SAMUEL R. PIERCE, JR., individually and in his capacity as Secretary, U.S. Department of Housing and Urban Development; WILLIAM H. HERNANDEZ, JR., individually and in his capacity as Manager for Connecticut for the U.S. Department of Housing and Urban Development,

Defendants-Appellants-Cross-Appellees.

Before:

VAN GRAAFEILAND, MESKILL and WINTER,*
Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Blumenfeld, *J.*, granting plaintiffs' motion for attorneys' fees pursuant to Equal Access to Justice Act, 28 U.S.C. § 2412 (1982) (EAJA). The district court concluded that plaintiffs' fees application was proper under the EAJA because the government's position was not substantially justified. Because this conclusion was erroneous, the district court's judgment is reversed.

Reversed, remanded for entry of judgment against plaintiffs on their application for fees. Plaintiffs' crossappeal is dismissed. No costs.

JOHN S. KOPPEL, Department of Justice, Civil Division, Washington, D.C. (Richard K. Willard, Acting Assistant Attorney General, Robert S. Greenspan, Department of Justice, Washington, D.C., Alan H. Nevas, United States Attorney for the District of Connecticut, of counsel), *for Appellants-Cross-Appellees.*

DENNIS J. O'BRIEN, Connecticut Legal Services, Inc., Willimantic, CT (Douglas M. Crockett, Norman K. Janes, Connecticut Legal Services, Inc., Willimantic, CT, of counsel), *for Appellees-Cross-Appellants Connecticut Legal Services, Inc.*

WILLIAM H. CLENDENEN, San Fernando Valley Neighborhood Legal Services, Inc., Pacoima, CA (Fred Altshuler, Lew Hollman, San Fernando Valley Neighborhood Legal Services, Inc., Pacoima, CA, of counsel), *for Appellees-Cross-Appellants San Fernando Valley Neighborhood Legal Services, Inc.*

MESKILL, *Circuit Judge:*

This action is before us on appeal from a judgment entered in the United States District Court for the District of Connecticut, Blumenfeld, *J.*, granting plaintiffs' motion for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982) (EAJA). The court held that the government's position in litigation was not substantially justified so that a fee award to plaintiffs was proper. Because we disagree with the court's conclusion, we reverse. We also dismiss plaintiffs' cross-appeal concerning the amount and calculation of the award.

I

This case represents the final chapter in a lengthy series of actions concerning federal housing subsidies. Because the issue before us is a limited one—whether the district court's award of fees was proper—a brief review of the facts will suffice. The complete factual and procedural history of the underlying actions has been exhaustively covered in a number of prior opinions. *See Dubose* v. *Pierce,* 579 F.Supp. 937, 941-46 (D. Conn. 1984) (*Dubose V*); *Dubose* v. *Harris,* 82 F.R.D. 582, 583-85 (D. Conn. 1979) (*Dubose IV*); *Dubose* v. *Harris,* 434 F.Supp. 227, 228-30 (D. Conn. 1977) (*Dubose III*); *Dubose* v. *Hills,* 22 Fed.R.Serv.2d 476, 477 (D. Conn. 1976) (*Dubose II*); *Dubose* v. *Hills,* 405 F.Supp. 1277, 1280-82 (D. Conn. 1975) (*Dubose I*), *modified on other grounds,* 420 F.Supp. 399 (D. Conn. 1976).[1]

Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (1982), provides for financial assistance to owners of low income housing projects. In 1974 Congress modified this program through passage of the Housing and Community Development Act of 1974 (HCDA), Pub. L. No. 93-383, 88 Stat. 633. Among the changes instituted by HCDA was the addition of § 1715z-1 (f) (3) (A) (1976), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 § 322 (f) (7), 95 Stat. 403. Section 1715z-1 (f) (3) (A) amended HCDA's operating subsidy program to allow the Secretary of Housing and Urban Development (HUD) to make "additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level." 12 U.S.C. § 1715z-1 (f) (3) (A) (1976). These payments were intended to protect tenants in low income housing from rent boosts that would otherwise result from increases in property taxes and utility costs.

This subsidy program was not implemented. Instead, HUD allowed owners to pass cost increases along to tenants as higher rents. The Secretary believed that implementation of the program was discretionary and that the agency could choose to use its funds in other ways.

The underlying action followed. In 1975 Judge Blumenfeld granted the tenants' motion for a preliminary injunction ordering the Secretary to implement the program. *Dubose I,* 405 F.Supp. at 1292-93. Rather than appealing that decision, HUD concentrated its opposition on projects other than those covered by the injunction. In May 1976, after additional suits were filed, the court certified a statewide class of project-plaintiffs and ordered HUD to pay subsidies to all projects in Connecticut. *Dubose II,* 22 Fed.R.Serv.2d at 477-79.

In June 1976, the United States District Court for the District of Columbia issued a permanent injunction ordering HUD to pay the subsidies for nationwide housing projects. *Underwood* v. *Hills,* 414 F.Supp. 526, 532 (D.D.C.

1976). That injunction was stayed by the Supreme Court pending appeal. 429 U.S. 892 (1976) (action of whole Court). In 1977 the Supreme Court granted *certiorari* in two related cases, *Harris* v. *Abrams* and *Harris* v. *Ross*, 431 U.S. 928 (1977). *See Abrams* v. *Hills*, 547 F.2d 1062 (9th Cir. 1976), *vacated sub nom. Pierce* v. *Abrams*, 455 U.S. 1010 (1982), and *Ross* v. *Community Services, Inc.*, 405 F.Supp. 831 (D. Md. 1975), *aff'd*, 544 F.2d 514 (4th Cir. 1976), *vacated sub nom. Pierce* v. *Ross*, 455 U.S. 1010 (1982).

Before those cases could be heard, the parties in the related actions agreed to a settlement. Under this agreement, HUD was to pay into the *Underwood* Court a settlement fund from which eligible tenants were to receive retroactive tax and utility cost subsidy payments. *See* Stipulation for Settlement, *reprinted as* Appendix to *Dubose IV*, 82 F.R.D. at 592-605 (Stipulation). The Stipulation also required that the underlying cases were to remain active until settlement administration was completed. Stipulation, 82 F.R.D. at 598 ¶ 7. This settlement was approved by the Connecticut district court. *Dubose IV*, 82 F.R.D. at 588-92.

During the settlement administration process, the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982) (EAJA), was passed. The relevant provision of EAJA states:

> [e]xcept as otherwise specifically provided by statue, a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust.

28 U.S.C. § 2412 (d) (1) (A) (emphasis added).

The plaintiffs in both the Connecticut action and in certain California actions moved for fees pursuant to section 2412 (d) (1) (A). Both courts ruled in favor of the plaintiffs, holding that the government had failed to establish either of the statutory defenses to the awarding of fees. *Dubose V*,

579 F.Supp. at 948-52; *Underwood* v. *Pierce,* 547 F.Supp. 256, 261-64 (C.D.Cal. 1982), *appeal pending* No. 83-5773 (9th Cir.).

In the instant case, Judge Blumenfeld held that HUD's position was not "substantially justified" under EAJA. The court noted that the fact that the government was not ultimately successful would not lead ineluctably to the conclusion that HUD's position was unjustified. Instead, the court evaluated the "reasonableness" of the agency's litigation position. The court held that "HUD's position was not merely unreasonable but had no justifiable basis," *Dubose V,* 579 F.Supp. at 950, and that the government's assertion that "special circumstances" made an award unjust, 28 U.S.C. § 2412 (d) (1) (A), was similarly unavailing. HUD insisted that because the settlement agreement barred payment of attorneys' fees from the fund, which was the only possible source of fees at the time, any award of fees was thereby barred. The court rejected this argument, holding that an award of fees was proper under EAJA despite the terms of the settlement agreement.

II

Because we believe that the government's position was substantially justified, we reverse the judgment of the district court. We therefore need not consider the effect of the settlement agreement provision that barred the use of the fund for attorneys' fees.

The district court's determination that HUD's position was not plausible should be viewed as a conclusion of law, *Spencer* v. *NLRB,* 712 F.2d 539, 563 (D.C. Cir. 1983), *cert. denied,* 52 U.S.L.W. 3756 (U.S. Apr. 16, 1984), and subject to *de novo* review. *Boudin* v. *Thomas,* 732 F.2d 1107, 1117 (2d Cir. 1984).

The definition of "position" under EAJA is settled in this Circuit. In *Boudin* we determined that the term refers to the government's position in litigation rather than its actions during the underlying administrative proceedings.

Boudin, 732 F.2d at 1115-16. Therefore, we may consider only HUD's litigating posture in our examination of justification.

The government bears the burden of proving that its action as a litigant was substantially justified. *Environmental Defense Fund, Inc.* v. *Watt,* 722 F.2d 1081, 1087 (2d Cir. 1983); *Spencer,* 712 F.2d at 557; *Ellis* v. *United States,* 711 F.2d 1571, 1575 (Fed. Cir. 1983); *Dougherty* v. *Lehman,* 711 F.2d 555, 561-62 (3d Cir. 1983); H.R. Rep. No. 1418, 96th Cong., 2nd Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4989. "The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made." H.R. Rep. No. 1418 at 10, 1980 U.S. Code Cong. & Ad. News at 4989. *See also Environmental Defense Fund,* 722 F.2d at 1085; *Tyler Business Services, Inc.* v. *NLRB,* 695 F.2d 73, 76 (4th Cir. 1982) (absence of rational explanation for gap in proof results in finding of absence of justification).

Plaintiffs prevailed in the underlying action in the district court because the court rejected Secretary Hills' claim that her refusal to implement the operating subsidy program was a valid exercise of discretion. *Dubose I,* 405 F.Supp. at 1288-92. HUD's litigation position was premised on its belief that, under the National Housing Act, the agency had discretion to choose the ways in which it would implement national housing policy. In support of its position, HUD relied on *Pennsylvania* v. *Lynn,* 501 F.2d 848 (D.C. Cir. 1974). In *Lynn* the D.C. Circuit held that Secretary Romney had discretion to terminate a number of housing programs and that he had not abused his discretion in so doing, because he believed that the legislative purposes were not served by these programs.

Secretary Hills, defendant's predecessor, argued before the district court that she had discretion as to the implementation of the operating subsidy program based on the

language and legislative history of the Act and on Congress' subsequent funding decisions. She also argued that her lawful discretion over the allocation of her contract authority permitted her to refuse to fund the operating subsidies. We are concerned not only with the substantive accuracy of this position as viewed by hindsight, but also with the agency's legal justification for its actions throughout the litigation.

We are convinced that HUD has borne its burden of proving that its litigation position, albeit ultimately unsuccessful, was not unreasonable. Our analysis of this "borderline" case is aided by our examination of the factors developed by the *Spencer* Court. *United States* v. *2,116 Boxes of Boned Beef,* 726 F.2d 1481, 1486 n.11 (10th Cir. 1984), *cert. denied,* 53 U.S.L.W. 3236 (U.S. Oct. 1, 1984); *Foley Construction Co.* v. *United States Army Corps of Engineers,* 716 F.2d 1202, 1204 (8th Cir. 1983), *cert. denied,* 52 U.S.L.W. 3756 (U.S. Apr. 16, 1984). These factors are: the clarity of the governing law, the foreseeable length and complexity of the litigation and the consistency of the government's position. *Spencer,* 712 F.2d at 559-61.

1. *Clarity of the Governing Law*

The government's position must be evaluated according to the legal justification for its posture throughout the litigation rather than by hindsight after later judicial interpretations of the issues involved. *See Devine* v. *Sutermeister,* 733 F.2d 892, 895 (Fed. Cir. 1984). At the time the underlying action was filed, the D.C. Circuit's conclusion in *Lynn,* the only judicial guidance available, offered no hint of the ultimate outcome of the subsequent cases. In preparing its litigation stance the government relied on arguments similar to those which had succeeded in *Lynn.* The district court admitted that it initially found *Lynn* to be relevant. *Dubose V,* 579 F.Supp. at 950-51.

The district court's reevaluation of its earlier view of the justification for the government's position ignores the requirement that we consider HUD's perspective as the

agency developed its trial appeal strategy. The factors that the court later found persuasive in distinguishing *Lynn* were not so obvious at that stage. The governing law, to the extent that it existed, did not mandate HUD's surrender early in the litigation. Although HUD's position became more questionable as adverse trial and appeal decisions accumulated, we cannot say that the tally ever became so onesided as to render HUD's position clearly unjustifiable.

Thus, the first of the *Spencer* factors, the clarity of the governing law, tilts in favor of HUD. *See Cornella* v. *Schweiker,* 741 F.2d 170, 172 (8th Cir. 1984) (where all legal issues were questions of first impression in circuit, agency's action in seeking clarification from courts was reasonable); *Boudin,* 732 F.2d at 1116 (law on issue in question was not clear at time of suit; government's position was reasonable). Cf. *Hoang Ha* v. *Schweiker,* 707 F.2d 1104, 1106 (9th Cir. 1983) (case previously decided, adverse to government's position, is factor in assessing reasonableness, but cases from other circuits are not conclusive); *Wyandotte Savings Bank* v. *NLRB,* 682 F.2d 119, 120 (6th Cir. 1982) (fact that government's position was contrary to prior Sixth Circuit precedent did not mean that it was not substantially justified; fees denied).

2. *Foreseeable Length and Complexity of Litigation*

> The *spencer* Court stated:
> Sensitivity to the central objective of the Act—reduction of the deterrents to challenges of unreasonable government conduct—thus suggests that, in categories of cases in which substantial investments of effort and money commonly are required to prosecute suits to their ultimate conclusions, the government should be obliged to make an especially strong showing that its persistence in litigation was justified.
> 712 F.2d at 560.

This factor adds little to our analysis. While this litigation has certainly been long and complex, spanning some ten years and several circuits, we find no indication that

the government's behavior deterred aggrieved tenants from filing suits. Indeed, the government paid the subsidies that were ordered in the December 1975 and May 1976 injunctions until operation of the May 1976 injunction was stayed by this Court. *See Dubose II,* 434 F.Supp. at 230; *see also* 429 U.S. 1085 (1977) (action by whole court refusing to vacate stay issued by Second Circuit).[2]

Moreover, simple reliance on the length of the litigation in this case is deceptive. The settlement negotiations and fee motions have been proceeding since 1977. Neither of these developments was foreseeable at the outset of the litigation. We find no reason to include this case in the category described by the *Spencer* Court. Hence we decline to impose on HUD the burden of making an "especially strong showing" of justification merely because the litigation has been long-lived. We conclude that, at most, this factor provides little benefit to either party.

We note also that the foreseeable complexity of the litigation is closely tied to the first factor, the clarity of the governing law. Where, as here, the government's position appeared at first to be supported by persuasive case law, the government should not be penalized for defending a suite which becomes long, complex and eventually unsuccessful.

3. *Consistency of the Government's Position*

The *Spencer* Court suggested that where the government acts to single out one private party as the victim of an inconsistent interpretation, the government's unpredictability should be penalized. *Spencer,* 712 F.2d at 560-61. Here, by contrast, the plaintiffs cannot argue that they were "subjected to *atypically* harsh treatment." *Id.* at 561. It has been clear throughout the history of this litigation that the Secretary had no intention of paying *any* operating subsidies unless those payments were made in response to court orders. This factor, then, clearly supports a denial of legal fees.

In sum, the *spencer* factors alone demonstrate that HUD's litigation position was substantially justified. But we need not rely exclusively on those factors. Additional considerations lead to the same result.

The district court also refused to credit either the stays issued by this Court and the Supreme Court, or the Supreme Court's grant of *certiorari* in two related cases, suggesting that those events were "too opaque" to lend credence to a conclusion that HUD's position was justified. As to the former, the court found no indication that the Supreme Court's grant of a stay indicated any view as to the merits; our subsequent issuance of a stay was dismissed with the suggestion that we "had little choice but to grant one." *Dubose V*, 579 F.Supp. at 950. And as to the latter, the court suggested that the Supreme Court might have granted *certiorari* in those two cases, both of which had ruled against the government, in order to affirm the lower court's rejection of HUD's position. *Id.* We reject this reasoning.

"A court in staying the action of a lower court . . . must take into account factors such as irreparable harm and probability of success on the merits." *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1305 (Rehnquist, Circuit Justice, 1976) (granting motion to vacate stay; citing *O'Brien* v. *Brown*, 409 U.S. 1, 3 (1972) (per curiam)). In this Circuit, in addition to considering the harm to the parties and the public interest, a court must find that the movant has demonstrated "a substantial possibility, although less than a likelihood, of success." *Hayes* v. *City University of New York*, 503 F.Supp. 946, 963 (S.D. N.Y.), *aff'd on other grounds sub nom. Hayes* v. *Human Resources Administration*, 648 F.2d 110 (2d Cir. 1981). *See also In re Turner*, 309 F.2d 69, 72 (2d Cir. 1962). We find it unlikely that these cirteria were overlooked by this Court simply because the Supreme Court had already acted. We see both stays as indicative of the courts' view that the government's position was not unreasonable.

The same is true of the Supreme Court's grant of *certiorari*. Although the outcome of the Court's examination of this situation was left forever in limbo by the settlement, we do not believe that the district court's interpretation is the only plausible one. We believe that it is equally probable that the Court granted *certiorari* not to affirm but to reverse the lower court decisions.

The district court cited its previous opinion as support for its conclusion that HUD's conduct was "unreasonable [and] had no justifiable basis." *Dubose V*, 579 F.Supp. at 950. However, the court's prior opinion has little bearing on the instant determination because the first conclusion was not "made with an intent to resolve EAJA questions." *Cinciarelli* v. *Reagan*, 729 F.2d 801, 806 (D.C. Cir. 1984).

Similarly, the district court's suggestion that the numerous adverse rulings in the lower courts should lead to a different result does not convince us to overlook the many factors supporting our conclusion, particularly in light of the stays and grant of *certiorari* discussed above. Nor does the court's suggestion that the government's participation in the settlement represented an admission that the litigation was unjustified merit much analysis. Speculation as to the agency's intent in settling adds little to our analysis. A holding that an agency's decision to settle an appeal on terms favorable to the claimant undercuts the agency's justification of its litigation position would discourage future settlements, a factor we should not lightly disregard. A litigation position that was justified, for EAJA purposes, before a settlement should not later lose its justification as a result of the settlement. After all, policy reasons quite apart from the merits of the dispute may, in the last analysis, dictate a premature termination of the litigation.

III

For the reasons stated above, we vacate the judgment of the district court and hold that the government has carried its burden of proving that its litigation position was

substantially justified. In view of this determination, we need not reach the issue of whether the settlement agreement provision barring an award of fees from the fund affects a fee award under EAJA. We also need not reach the plaintiffs' cross-appeal concerning the amount and calculation of fees. The cross-appeal is dismissed. We remand to the district court for entry of an order dismissing the complaint.[3] No costs on appeal.

ENDNOTES

* Judge Winter having recused himself after oral argument, this decision is rendered solely by Judges Van Graafeiland and Meskill, who are in agreement, pursuant to § 0.14 (b) of the Rules of the United States Court of Appeals for the Second Circuit.

1. In addition to the actions in the District of Connecticut, related suits were filed in other parts of the country, including the District of Columbia, Maryland and California. *See Abrams* v. *Hills*, 547 F.2d 1062 (9th Cir. 1976), *vacated sub nom. Pierce* v. *Abrams*, 455 U.S. 1010 (1982); *Underwood* v. *Hills*, 414 F.Supp. 526 (D.D.C. 1976); *Ross* v. *Community Services, Inc.*, 405 F.Supp. 831 (D. Md. 1975), *aff'd*, 544 F.2d 514 (4th Cir. 1976), *vacated sub nom. Pierce* v. *Ross*, 455 U.S. 1010 (1982). For other related cases, see *Dubose* v. *Harris*, 82 F.R.D. 582, 585 n.12 (D. Conn. 1979).

2. Our stay was issued after that ordered by the Supreme Court, 429 U.S. 892 (1976) (action by whole Court), in *Underwood* v. *Hills*, 414 F.Supp. 526 (D.D.C. 1976).

3. The government argued before the distrct court that the actions were not "pending" on the effective date of the EAJA and that EAJA did not permit an award of fees for work performed prior to that date. These arguments have been abandoned on appeal.

II. OTHER OPINIONS AND ORDER IN THIS CASE

Vernice DUBOSE, et al.

v.

Samuel R. PIERCE, Jr., et al.

Claudia WALTER, et al.

v.

Samuel R. PIERCE, Jr., et al.

Janette LITTLE, et al.

v.

Samuel R. PIERCE, Jr., et al.

Mae PLEASANT, et al.

v.

Samuel R. PIERCE, Jr., et al.

Pantaleon MORALES, et al.

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Cathy ADAMS, et al.

v.

Samuel R. PIERCE, Jr., et al.

Merry E. GRUNDMAN, et al.

v.

Samuel R. PIERCE, Jr., et al.

Joann JOHNSON, et al.

v.

Samuel R. PIERCE, Jr., et al.

Civ. Nos. H–75–303, H–75–345, H–75–346, H–76–26, N–76–44, H–76–89, H–76–160 and N–76–109.

United States District Court,

D. Connecticut.

Feb. 7, 1984.

In litigation relating to failure of the Department of Housing and Urban Development to implement federal operating subsidy program for low-income housing projects, matter came on for determination with respect to attorney fee awards under the Equal Access to Justice Act. The District Court, Blumenfeld, Senior District Judge, held that: (1) plaintiffs, who obtained favorable settlement, were "prevailing parties," entitled to fee award under the Act, effective date of which was during settlement administration, even though plaintiffs, as legal services clients, were under no obligation to pay their lawyers; (2) government was not substantially justified in making its claim in court, as opposed to underlying conduct toward plaintiffs; (3) no special circumstances made attorney fee award unjust; (4) legal services attorney who had substantial responsibility for subject litigation and who left employ of legal services program and eventually became employed by legal aid organization in another city, having been permitted to "take the case with him" and continue to work on it as lead counsel, was not individually entitled to any attorney fee award, either for time in which he was in private practice or during period in which he was employed by other legal aid organization; and (5) attorney fee awards in favor of legal services organizations would be made, respectively, in amount of approximately $11,000 for 188 hours, $114,000 for 1,815 hours and $15,000 for 225 hours.

So ordered.

James C. Sturdevant, San Francisco, Cal., Dennis J. O'Brien, Conn. Legal Services, Inc., Willimantic, Conn., Norman K. Janes, Conn. Legal Services, Inc., Middletown, Conn., Michael Sheehan, New Haven Legal Assistance, New Haven, Conn., Raymond R. Norko, Legal Aid Society of Hartford County, Hartford, Conn., Sue Ann Shay, Neighborhood Legal Services, Hartford, Conn., for plaintiffs.

Linda Hanten, Legal Services Corp., Washington, D.C., amicus curiae.

Sheila Lieber, June R. Carbone, Merril Hirsh, U.S. Dept. of Justice, Civil Division, Washington, D.C., for defendant. Fred H. Altshuler, Altshuler & Berzon, San Francisco, Cal., William H. Clendenen, Jr., Clendenen & Lesser, New Haven, Conn., Thomas V. Siporin, San Fernando Valley Neighborhood Legal Services, Pacoima, Cal.

RULING ON MOTIONS FOR ATTORNEYS' FEES

BLUMENFELD, Senior District Judge

Introduction

In recent years, over 100 congressional enactments have provided for the awarding of attorneys' fees to prevailing litigants. Applicants have responded to this potential source of funds by pursuing fee requests with such tenacity and thoroughness that the Supreme Court has recently been led to warn, "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart,* ——— U.S. ———, 103 S.Ct. 1933, 1941, 70 L.Ed.2d 40 (1983) (applying 42 U.S.C. § 1988). One beneficial result of the enormous volume of attorney's fee cases has been a substantial, well-developed body of law. With the guidance of cases such as *Hensley v. Eckerhart, id.,* and *New York State Association for Retarded Children v. Carey,* 711 F.2d 1136 (2d Cir.1983) (applying 42 U.S.C. § 1988), district courts are, for the most part, presented with the task of applying to the case at hand already established principles.

While such is true for many of the issues the parties have brought before this court, this case does raise some novel and unsettled questions. First, is an attorney who began work on a case as a legal services lawyer and continued to act as counsel, both after his transfer to a second legal service firm and after his later entry into private practice, personally entitled to any fees for his work? Second, are prevailing plaintiffs entitled to a multiplier in their fee claim arising under the Equal Access to Justice Act?

Although some issues in this case may be novel, they nevertheless call into play evercompeting policy interests. This court must navigate between the Scylla of Judge New-

man's warning in *Carey*—"attorney's fees are to be awarded 'with an "eye to moderation," seeking to avoid either the reality or the appearance of awarding "windfall fees," ' " 711 F.2d at 1139 (citations omitted)—and the Charybdis of Justice Brennan's *Hensley* dissent—"lower courts must not forget the need to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them," 103 S.Ct. at 1945.

Plaintiffs' counsel have moved for attorneys' fees against defendant United States Department of Housing and Urban Development (HUD) pursuant to 28 U.S.C. § 2412 (Supp. IV 1980), part of the Equal Access to Justice Act (EAJA).[1] Motions have been filed by five public interest law firms, and by one individual attorney. The five firms are: Connecticut Legal Services (CLS), San Fernando Valley Neighborhood Legal Services (San Fernando), Legal Aid Society of Hartford County (LASH), Neighborhood Legal Services (of Hartford) (NLS), and New Haven Legal Assistance Association (NHLA). The attorney is James C. Sturdevant. In addition, San Fernando and attorney Sturdevant have filed supplemental fee motions concerning work done by Mr. Sturdevant after April 4, 1979, *see infra* pp. 945–946. CLS has joined in both of San Fernando's motions.

Complicating this case has been a dispute over the right to fees for work performed by Sturdevant.

From October 1975 through April 30, 1978, Mr. Sturdevant worked for CLS. Mr. Sturdevant concedes that CLS has the right to any fees for his work during that time. From May 1, 1978 through October 8, 1978, and also from May 1, 1980 to the present, Mr. Sturdevant asserts that he was self-employed. None of plaintiffs' counsel have challenged Mr. Sturdevant's claim to any fees awarded for his work during those periods.

There is, however, one dispute among plaintiffs' counsel. San Fernando and attorney Sturdevant both claim the right to any fees awarded for Sturdevant's work from October 9, 1978 through April 30, 1980, during which time Sturdevant was a full time employee of San Fernando.

I. THE HISTORY OF THIS ACTION

This proceeding is the final act of a protracted litigation concerning federal housing subsidies under section 236 of the National Housing Act. Most of the action occurred early on: congressional passage of the subsidy program, the dispute over its implementation, and the ensuing litigation. The settlement of what was by then a national class action provided the case's climax, with the settlement administration as the denouement. The struggle over attorneys' fees is what remains.

In 1968, Congress enacted, as section 236 of the National Housing Act,[2] a rental housing program which provided mortgage insurance and made interest reduction payments on behalf of owners of qualifying low-income housing projects. Housing and Urban Development Act of 1968, Pub.L. No. 90–448, § 201, 82 Stat. 476. Paragraph (f) of section 236 established that the rental for each unit would be either a "basic rental," equal to the operating cost, or a higher value not to exceed either 25 per cent of the tenant's income or the unit's market value. Codified at 12 U.S.C. § 1715z-1(f) (1970).

In the Housing and Community Development Act (HCDA) of 1974, Pub.L. No. 93–383, 88 Stat. 633, Congress amended section 236 to provide an additional form of subsidy, called an "operating subsidy." [3] This subsidy was designed to shield tenants from rent increases due to increases in property taxes and utility costs. The subsidy program paid project owners in full for these increases, except that the subsidies could not be used to drive the basic rent below 30 per cent of the tenant's income.[4] These subsidies of the owners' operating costs resulted in decreased basic rents.

In addition, the Act established a "reserve fund" from which the operating subsidies could be paid. To build up this fund, project owners were required to contribute all rents received in excess of the "basic rental." [5]

HUD failed to implement the section 236 operating subsidy program while allowing owners to increase rental charges to cover increased operating costs. That squeeze on the tenants prompted this action and similar suits across the country. In 1979, this and several other actions were settled jointly. The settlement called for reimbursements of those increases in rental charges to present and former tenants nationwide. The administration of these payments has been supervised by the court in *Underwood v. Pierce,* No. 79–1318–HP (C.D.Cal.).

A. *Events Preceding Settlement*

This matter started before this court as three separate class actions, each brought by tenants in a different section 236 housing project. The tenants were aggrieved by HUD's approval of increases in the "basic rents" for these projects. They challenged the rent increases as excessive in view of the operating costs and sought to compel HUD to pay operating subsidies to the project owners to cover that part of each increase which was due to increased utility costs and property taxes. On December 15, 1975, after a consolidated hearing, this court certified plaintiff classes in each of these actions and issued preliminary injunctions requiring HUD to make operating subsidy payments to project owners, thus relieving plaintiffs of portions of the rent increases which were due to increased utility costs and property taxes. *Dubose v. Hills,* 405 F.Supp. 1277, 1278–79 & nn. 8, 10, 1280, 1292–93 (D.Conn.1975), *modified,* 420 F.Supp. 399 (D.C.1976).

HUD did not appeal the order regarding these three projects, *see Dubose v. Harris,* 434 F.Supp. 227, 229 (D.C. 1977); instead, it continued to resist making operating subsidy payments on behalf of tenants in other projects, *see Dubose v. Hills,* 22 Fed.R. Serv.2d 476, 477 (D.C.1976). Six similar suits were subsequently filed in this district, one of which was withdrawn. On May 27, 1976, this court consolidated the remaining eight pending actions into one statewide class action, and issued a preliminary injunction compelling HUD to pay operating subsidies throughout Connecticut. *Id.* at 477–79.

HUD appealed this statewide preliminary injunction. On June 28, 1976, this court denied defendants' request for a stay pending appeal. The Second Circuit did the same on July 20, 1976. *See Dubose v. Harris,* 434 F.Supp. at 239.

Meanwhile, similar actions had been filed across the country. *See Dubose v. Harris,* 82 F.R.D. 582, 585 (D.C. 1979). Understandably, one of these was a nationwide class action filed in the District of Columbia. *See Underwood v. Hills,* 414 F.Supp. 526, 528 (D.D.C.1976). In *Underwood,* Judge Pratt, on June 8, 1976, issued a permanent injunction compelling HUD to make operating subsidy payments. *Id.* at 532. On October 18, 1976, the Supreme Court stayed this order pending appeal. 429 U.S. 892, 97 S.Ct. 250, 50 L.Ed.2d 175 (1976) (action by whole Court). Relying on the Supreme Court's stay in *Underwood,* HUD renewed its application to the Second Circuit for a stay pending appeal. The Second Circuit granted this stay on December 27, 1976. *See Dubose,* 434 F.Supp. at 230. On February 22, 1977, the Supreme Court refused to vacate this stay. 429 U.S. 1085, 97 S.Ct. 1092, 51 L.Ed.2d 531 (1977) (action by whole Court).

HUD then ceased all operating subsidy payments statewide, including those covered by this court's first order of December 1975, which HUD had not appealed. *See Dubose,* 434 F.Supp. at 230. This court held that HUD had thus violated the December 1975 order, and ordered HUD to continue compliance with that order. *Id.* at 231, 232. While noting that "it would be within this court's discretion to hold defendants in contempt," *id.* at 232, this court declined to do so because it was "not convinced that defendants acted in bad faith or out of a willful purpose to disobey the orders of this court," but thought rather that defendants had been confused by "ambiguities in the situation confronting them." *Id.*

B. *The Settlement*

On May 23, 1977, the Supreme Court granted certiorari in two cases similar to *Dubose, Harris v. Ross* and *Harris v. Abrams.* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977).

Up to this time the lower courts had unanimously ruled in favor of the plaintiffs in the various actions. *See Dubose,* 82 F.R.D. at 585 & n. 12.

Before the Supreme Court could decide *Ross* and *Abrams,* the parties in those actions, this (consolidated) action, and *Underwood* agreed on a settlement. *See* Stipulation for Settlement (hereinafter "Stipulation") reproduced as an appendix to this court's opinion approving the settlement. *Dubose v. Harris,* 82 F.R.D. 582, 592–99 (D.C.1979).[6] The settlement in *each* of these four actions was contingent on court approval of the settlement in each of the others. Stipulation ¶ 7; Settlement Agreement ¶ 7.

Under the proposed settlement, HUD would pay into the *Underwood* court a settlement fund of about $60 million, consisting of the balance of its "reserve fund" as of September 30, 1977. Stipulation ¶ 2. The settlement fund was to be used to reimburse to tenants, as nearly as practicable, the amounts which should have been paid by HUD as operating subsidies. "Every tenant who resided in a Section 236 project . . . between February 1, 1975 and September 30, 1977, and who paid in excess of 30 percent of his or her adjusted monthly income . . . for rent . . . as of the last month of residence in the project, the last month before receiving a federal rental subsidy, or September, 1977, whichever is earlier, will be eligible to receive retroactive tax and utility cost subsidy payments." Stipulation ¶ 3(a).[7] Each eligible recipient would receive a payment equal to "the number of months between February 1, 1975 and September 30, 1977, during which he or she resided in a Section 236 project without receiving an additional federal rental subsidy, multiplied by the tenant's monthly share of the actual increases in tax and utility costs as of September 30, 1977 at that Section 236 project." *Id.* ¶ 3(b).[8]

If the tenants' claims made under this settlement exceeded the settlement fund, claimants were to receive pro rata shares. If the claims totaled less than the settlement fund, the excess was to be returned to HUD's reserve fund. Stipulation ¶ 3(e).

The parties were aware that it would require a major undertaking to locate eligible claimants, inform them of the settlement, and evaluate and pay their claims. This process has been referred to by the parties as "settlement administration." Under the Stipulation, settlement administration would be performed in the main by Price Waterhouse and Co. (PW), a national accounting firm, under the direction of plaintiffs' counsel. Stipulation ¶ 4(b) (plaintiffs' counsel to direct pilot test of claim forms); *see also* Stipulation ¶ 4(a), *together with* "Proposal to Conduct a Settlement Distribution in Connection with *Underwood v. Hills* and *Dubose v.* Hills, August 9, 1978" (filed Nov. 8, 1978) at 4 ("we would be prepared to administer all phases of the distribution project under the direction of Plaintiff's counsel").

The Stipulation assigned certain tasks directly to plaintiffs' counsel. They would prepare a form of preliminary notice to be mailed to current tenants, ¶ 6(a)(2); cause copies of these notices to be published in "the newsletters of the Legal Services Corporation, the National Housing Law Project, and other publications directed to legal services attorneys and their clients," *id.;* similarly publish final notices, ¶ 6(b)(3); and, along, with PW, "make reasonable efforts to minimize the costs of administration of the settlement and distribution of the settlement fund," ¶ 4(d).

HUD was to aid the settlement effort in various ways. First, HUD was to provide PW with detailed information concerning all section 236 projects. ¶ 5. Second, HUD was to ensure that project owners provided PW with names and last-known addresses of former tenants who had resided in their projects from February 1, 1975 through September 30, 1977. ¶ 6(b)(2), (c). Third, HUD was to require project owners to post and distribute notices of the settlement in their projects, and, if necessary, HUD was to do so itself. ¶ 6(b)(1), (c). Fourth, HUD was to publicize the settlement in various publications. ¶ 6(a)(2), (b)(3).[9]

The Stipulation provided for payment of various expenses. The settlement fund would be used to pay PW, an escrow agent, and "all costs of administration or out-of-pocket costs, including travel, incurred by plaintiffs' counsel" in "obtaining approval of this settlement, administration of the settlement, and distribution of the settlement fund." ¶ 4(c). Additionally, the settlement fund would also be used to pay HUD's expenses in providing notice of the settlement and in distributing claim forms. ¶ 6(a)(2), (b)(3). HUD would bear three particular costs: postage, a WATS line, and the cost to PW of assembling and copying documents requested by HUD for auditing purposes. ¶ 4(d). After identifying these items, the Stipulation concluded: "It is the intent of the parties that distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD." *Id.* The Stipulation explicitly provided that "[n]one of the sums distributed may be used to pay attorney's fees." ¶ 3(f).

On November 13, 1978, this court preliminarily approved the settlement. *See Dubose,* 82 F.R.D. at 585–86. On January 19, 1978, Judge Pratt preliminarily approved the settlement in *Underwood. Underwood* Docket Sheet (Exhibit A to Sturdevant Declaration filed June 29, 1983). The proposed settlement in *Underwood* included "Rules of Counsel." *See Dubose,* 82 F.R.D. at 592 n. 38. (A copy of these Rules of Counsel is given as Exhibit B in the Sturdevant Declaration filed June 29, 1983). These Rules established a Committee of Counsel (COC) consisting of Patricia M. Tenoso, plaintiffs' lead counsel in *Underwood;* Mary S. Burdick, plaintiffs' co-counsel in *Underwood;* and James C. Sturdevant, plaintiffs' lead counsel in *Dubose.* The COC was to perform the functions of plaintiffs' counsel as outlined in the Stipulation for Settlement. Judge Pratt's rationale for approving this composition of the COC does not appear in the record in this case.

On February 23, 1979, this court formally approved the settlement, noting that the members of the COC seemed well qualified for their task. *Dubose,* 82 F.R.D. at 592 & nn.

37–38. On April 5, 1979, Judge Pratt formally approved the settlement in *Underwood. Underwood v. Harris,* No. 76–469 (D.D.C. April 9, 1979), slip op. at 1. On that date Judge Pratt transferred the action to the Central District of California, with the parties' consent, because "the agent administering the distribution of the fund (Price Waterhouse), the bank in which the fund has been deposited and invested (Crocker) and all members of the Committee of Counsel are all located in Los Angeles, California." *Id.* at 1. He further approved the appointment of a fourth member to the COC, whose identity would be decided by the District Court in California. *Id.* at 2.

C. *Events Since Settlement*

Under the supervision of the *Underwood* court, Judge Pregerson presiding, settlement administration has been almost completely accomplished. Approximately $45 million was paid out to claimants. Interest earned by the fund has more than covered expenses. The unexpended principal (approximately $15 million), as well as the unused interest (less a reserve of $500,000, and further less a reserve for uncashed checks), has been returned to HUD's reserve fund. Sturdevant Declaration of June 29, 1983, Exhibits HH, II (orders in *Underwood* dated April 15, 1982, and Jan. 26, 1983, ordering return of principal and interest, respectively). As of May 1983, apparently no tasks remained except those associated with locating recipients of uncashed checks. *See* Declaration of Peter B. Frank, filed May 31, 1983, ¶ 4.

The *Underwood* plaintiffs have pressed fee motions in that court. Judge Pregerson in *Underwood* held that the plaintiffs are entitled to fees under the EAJA. *Underwood v. Pierce [Underwood I],* 547 F.Supp. 256, 263–64 (C.D. Cal.1982), *appeal pending,* App. No. 83–5773 (9th Cir.). The court awarded fees to the Western Center on Law and Poverty (Western Center) for work done by attorneys Tenoso and Burdick during 1976–1981 and 1976–1982 respectively. The court allowed hourly rates ranging from $85/hour in 1976 to $120/hour in 1981 for Tenoso, and rang-

ing from $80/hour in 1976 to $120/hour in 1982 for Burdick. The court further allowed an upward adjustment factor, or "multiplier," of 3.5. The total award was $1,129,450.00. *Underwood v. Pierce [Underwood II],* No. 79–1318–HP (C.D.Cal. Feb. 3, 1983), slip op. at 8, *appeal pending,* App. No. 83–5773 (9th Cir.).

Initially, Sturdevant and San Fernando moved in this court for fees for Sturdevant's work only until April 5, 1979, the date on which *Underwood* was transferred to the Central District of California; Sturdevant and San Fernando filed motions in *Underwood* concerning Sturdevant's work on and after April 5, 1979. However, in an unpublished order on November 29, 1982, filed February 1, 1983, the *Underwood* court dismissed these latter fee motions. That court reasoned that, though Sturdevant had appeared before it as a member of the COC, Sturdevant did so as counsel in *Dubose,* over which case that court lacked jurisdiction. Accordingly, Sturdevant and San Fernando have since filed supplemental motions in this court seeking fees for Sturdevant's work on and after April 5, 1979, thus consolidating all of their fee requests in this court.

II. PLAINTIFFS' ENTITLEMENT TO FEES

Plaintiffs are seeking attorney fees under the Equal Access to Justice Act (EAJA), Pub.L. No. 96–481, Title II, § 204, 94 Stat. 2325, 2327–29 (1980), *codified at* 28 U.S.C. § 2412 (Supp. IV 1980). The EAJA provides two grounds for a fee award in actions against the United States. First, "[u]nless expressly prohibited by statute," the government "shall be liable for . . . fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b). Plaintiffs claim that the government's bad faith conduct justifies a fee award under the first alternative of this provision.

At common law, fees may be awarded against a party who acts " 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska Pipeline Service Co. v. Wilder-*

ness Society, 421 U.S. 240, 258–259, 95 S.Ct. 1612, 1622, 44 L.Ed. 2d 141 (1975). HUD's conduct has been far from exemplary, yet, none of its conduct justifies a fee award on this ground. First, though HUD's litigation position that it had absolute discretion to decide not to fund the operating subsidy program was unreasonable, *see infra* p. 949, there is nothing to suggest that HUD's position was taken in bad faith. Next, though HUD did disobey this court's injunction of December 15, 1975, I concluded that HUD's disobedience arose out of confusion rather than out of "bad faith or . . . a willful purpose to disobey the orders of this court," *Dubose,* 434 F.Supp. at 232. Finally, regarding HUD's conduct during settlement administration, Judge Pregerson stated:

> [T]hough admittedly, there have been deficiencies in HUD's performance, my conclusion is that there is really no substantial basis to hold HUD in contempt. Its performance has not been outstanding, it has bordered on the satisfactory; but it is certainly not contemptuous.

Underwood, Reporter's Transcript of Proceedings on January 26, 1983 at 24.

[1] The EAJA provides a second, alternative ground for fee awards against the United States.

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

Plaintiffs in this case were prevailing parties. When this court approved the settlement, it observed that the settlement "will result in payments to eligible claimants and in greater amounts than would be available through ultimately successful litigation." *Dubose,* 82 F.R.D. at 592.

A favorable settlement, no less than a favorable judgment, confers the status of "prevailing party." Indeed, in the legislative history accompanying the EAJA, the Congress specifically noted that under the EAJA, "a party may be deemed prevailing if the party attains a favorabale settlement of his case, *Foster v. Boorstin,* 561 F.2d 340 (D.C.Cir.1977)." H.R.Conf.Rep. No. 1434, 96th Cong., 2d Sess. [hereinafter, Conference Report] 22, *reprinted in* 1980 U.S.Code Cong. & Ad.News 5003, 5010, *cited with approval in Underwood I,* 547 F.Supp. at 259 & n. 4; H.R.Rep. No. 1418, 96th Cong., 2d Sess. [hereinafter House Report] 11, *reprinted in* 1980 U.S.Code Cong. & Ad.News 4984, 4990. *See also Citizens Coalition for Block Grant Compliance v. City of Euclid,* 537 F.Supp. 422, 424–25 (N.D.Ohio 1982).

A. *Does the EAJA Apply to Cases with Non-Fee-Paying Clients?*

[2] Though the EAJA literally provides for an award of fees "incurred" by a party, 28 U.S.C. § 2412(d)(1)(A), the statute also applies to cases, such as this case, in which clients are under no obligation to pay their lawyers. Other courts have so held. *San Filippo v. Secretary of Health and Human Services,* 564 F.Supp. 173, 175–77 (E.D.N.Y.1983); *Hornal v. Schweiker,* 551 F.Supp. 612, 615–17 (M.D.Tenn. 1982); *Kauffman v. Schweiker,* 559 F.Supp. 372 (M.D.Pa. 1983); *Kinne v. Schweiker,* No. 80–81 Civ., slip op. at 1–8 (D.Vt. June 30, 1982), *vacated,* (D.Vt. Dec. 29, 1982). I find these opinions persuasive. The sole contrary authority, *Cornella v. Schweiker,* 553 F.Supp. 240, 245–48 (D.S.D.1982) relies on the earlier, vacated *Kinne* opinion.

B. *Was This Case "Pending" on the EAJA's Effective Date?*

[3] The EAJA, by its terms, applies to "any civil action . . . which is pending on, or commenced on or after," October 1, 1981. Pub.L. No. 96–481, § 208, 94 Stat. 2321, 2330 (enacted October 21, 1980, *reprinted* 5 U.S.C. § 504 (Supp. V 1981). On the EAJA's effective date, the parties to this case were carrying out the settlement agreement under the supervision of the *Underwood* court. At issue is whether a case, in that posture, was "pending" for purposes of the EAJA.

The meaning of "pending" in the EAJA has been broadly construed. The mere pendency of a motion for attorney fees, before the trial court or on appeal, is sufficient to render the entire action "pending." *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board,* 679 F.2d 64, 67–68 (5th Cir.1982); *United States ex rel. Heydt v. Citizens State Bank,* 668 F.2d 444, 446 (8th Cir.1982); *WATCH v. Harris,* 535 F.Supp. 9, 14 (D.Conn.1981) (Clarie, C.J.) (alternative holding).[10] *See also Bradley v. School Board,* 416 U.S. 696, 711, 715, 94 S.Ct. 2006, 2016, 2018, 40 L.Ed.2d 476 (1974) (similarly construing fee statute in section 718 of title VII of the Emergency School Aid Act, 20 U.S.C. § 1617 (Supp. II 1979); if statute is silent on its application "to pending cases," statue should generally be applied to them, because a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary"); *Rainey v. Jackson State College,* 551 F.2d 672, 675 & n. 4, 676 & n. 5 (5th Cir.1977) (similarly construing Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 (Supp. IV 1980), noting that, in Act's legislative history, *Bradley* was cited several times "as a prototypical case for awarding attorneys' fees in pending cases").

[4] In the present case, no final judgment had issued on the EAJA's effective date. This court had retained jurisdiction over the case pending settlement administration, which was being performed by the *Underwood* court. *Dubose,* 82 F.R.D. at 587, 592. The settlement administration had been proceeding continuously since settlement, and as of October 1, 1981, much unfinished business remained. *See, e.g., Underwood* Docket Sheet (Exhibit A to Sturdevant Declaration filed June 29, 1983). Under these circumstances, this action was "pending" on the Act's effective date.[11] *See also Underwood I,* 547 F.Supp. at 259–60 (holding that the *Underwood* action was "pending" on the EAJA's effective date).

C. *The Compensability for Work Performed Before the Act's Effective Date*

[5] The EAJA, when applicable to a given case, authorizes fee awards for work done before as well as after the Act's effective date. This holding is explicit in four cases construing the EAJA. *Berman v. Schweiker,* 713 F.2d 1290, 1291 (7th Cir. 1983); *Tyler Business Services, Inc. v. NLRB,* 695 F.2d 73, 77 (4th Cir.1982); *Nunes-Correia v. Haig,* 543 F.Supp. 812, 814–16 (D.D.C.1982); *Underwood I,* 547 F.Supp. at 260–61 & n. 7. This holding is implicit in the cases cited in part B *supra* which construe the EAJA, *Knights of the Ku Klux Klan, United States ex rel. Heydt,* and *WATCH,* as well as in the cases cited there which construe other fee statues, *Bradley, Rainey,* and *Carey.*

D. *The Timeliness of the Instant Fee Motions*

[6] The EAJA provides that "a party seeking an award of fees . . . shall, within thirty days of final judgment in the action, submit to the court an application." 28 U.S.C.A. § 2412(d)(1)(B). There has been no final judgment disposing of this case.[12] Therefore, the instant fee motions are not stale.

The statute's language just quoted might be thought to imply that a fee motion must await final judgment, and that the instant motions are therefore premature. "This language, however, should not be construed to require a final judgment on the merits before a court may award fees." House Report 18, *reprinted in* 1980 U.S. Code Cong. & Ad.News at 4997. The court then has some discretion to make interim fee awards.

In this case, almost all of the attorneys' work in this case has been completed, yet final judgment must await the "winding up" of settlement administration, *see supra* p. 945. This case has been pending since 1975, and further delay in any fee awards would work a hardship on the fee recipients. *Cf. Bradley,* 416 U.S. at 723, 94 S.Ct. at 2022. Accordingly, an interim fee award is proper. *See Underwood II* (making similar interim award); *cf. In re Coordinated*

Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F.Supp. 680, 703–04 (D.Minn.1975) (making interim antitrust fee award during settlement administration).

E. *HUD's Affirmative Defenses*

Although plaintiffs meet the prima facie requirements for an award under section 2412(d), the statute permits HUD to assert two affirmative defenses. Section 2412(d)(1)(A) provides that the court "shall award . . . fees . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

1. *Was HUD's Position "Substantially Justified"?*

[7] Section 2412(d) precludes a fee award if "the court finds that the position of the United States was substantially justified."[13] "The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made." House Report 10, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4989. *Accord, Spencer v. NLRB,* 712 F.2d 539, 557 (D.C.Cir.1983); *Knights of the Ku Klux Klan,* 679 F.2d at 68. The standard may in fact be slighly more stringent. *Spencer,* 712 F.2d at 558. The burden of proving reasonableness rests with the government. House Report at 10–11, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4989. *Accord, Tyler Business Services, Inc. v. NLRB,* 695 F.2d 73, 75 (4th Cir.1982). This standard of substantial justification represents a middle ground between an award of fees to every party who prevails against the government, and a requirement that the prevailing party prove that the government's position was "arbitrary, frivolous, unreasonable, or groundless." House Report 14, *reprinted in* 1980 U.S.Code Cong. & AD.News at 4993. *Accord, Knights of the Ku Klux Klan,* 679 F.2d at 68. Beyond this general guideline of "reasonableness," the "substantial justification" standard remains largely undefined. *See* Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act,* 11

Hofstra L.Rev. 307, 320–27 (1982). The legislative history does, however, note two further factors. First, to show substantial justification, the government need not establish "that its decision to litigate was based on a substantial probability of prevailing." House Report 11, *reprinted in* 1980 U.S. Code Cong. & Ad.News at 4990.[14] Second, certain types of case dispositions, including dismissals of prior suits, and substantial differences between the government's claims at pleading and the settlement agreed to, provide some indication that the government's position was not substantially justified. *Id. reprinted in* 1980 U.S. Code Cong. & Ad.News at 5011 (discussing "substantially justified" as applied to agency actions).

[8] HUD claims that its position in refusing to pay operating subsidies was substantially justified. This litigation started because HUD did not put into operation a housing subsidy program. *Dubose,* 405 F.Supp. at 1279. This court held first that the housing subsidy program was mandatory, and second that, even if HUD had some discretion to suspend the program, it had abused that discretion. *Id.* at 1288, 1291–92. This court explicitly held that HUD's abuse of discretion was "unreasonable." *Id.* at 1292.

Although HUD's action in resisting initiation of the operating subsidy program was held to be "unreasonable," and the standard for substantial justification is one of "reasonableness," it does not automatically follow that HUD's "position" was not "substantially justified." The standard in this case for determining whether HUD had abused its discretion was itself one of reasonableness. *Id.* at 1289. Thus, the mere fact that HUD lost on the merits (*i.e.,* that this court found an abuse of discretion) necessarily implied that HUD's action in refusing to pay operating subsidies was not "reasonable." But Congress, in passing the EAJA, rejected the notion that the government should be liable for fees whenever it lost. *See supra* p. 948. Accordingly, something more is needed to show that the government's "position" was not "substantially justified."

This paradox is resolved if the government's "position" in court, rather than its underlying conduct toward the plaintiffs by whom it is being sued, is the focus of attention. The proper question then is, even though HUD's action was held not to be reasonable, was HUD nevertheless substantially justified in *making its claim in court.*[15]

This court's prior opinion shows that HUD's position was not merely unreasonable but had no justifiable basis. HUD suspended the program because it believed that "such a limited and discriminatory program" was "inequitable,' " 405 F.Supp. at 1290, even though Congress had "specifically indicated its disagreement with precisely this sort of 'all or nothing' analysis," *id.* "Surely Congress has the power to solve a specific problem with which it is familiar without running the risk of administrative nonenforcement because it has not gone far enough, or not gone in the direction considered desirable by the executive branch." *Id.* at 1290–91. "The Secretary's claimed rationale for refusing to fund the program with her contract authority—its inequitable coverage—misses the point of Congress' actions entirely and does not constitute a valid exercise of discretion." *Id.* at 1291–92. While HUD purported to rely on a case which held that it had a *narrow* discretion to suspend housing subsidy programs, *see id.* at 1282 & n. 22, HUD claimed " 'full discretion to determine whether the program should be implemented,' " *id.* at 1281 (quoting HUD), a discretion which it clearly did not, and could not have.

HUD argues, however, that this court's opinion in 1975 is not the last word on whether HUD's position was substantially justified. As detailed above, following the Supreme Court's 1976 stay of the *Underwood* permanent injunction, the Second Circuit granted a stay of this court's statewide preliminary injunction. The Supreme Court in 1977 refused to vacate that stay. Also in 1977, the Supreme Court granted certiorari in two similar cases. *See Dubose,* 82 F.R.D. at 584; *supra* pp. 942–943. These developments, however, are too opaque to convince this court that HUD's position was substantially justified.

First, the grants of certiorari may have been extended not with reversal in mind, but with the purpose "to resolve the issues against HUD once and for all, thereby rejecting HUD's position which forced low-income tenants to bring class actions in district courts throughout the country." *Underwood I,* 547 F.Supp. at 262. *See* Supreme Court Rule 17.1(c) (indicating that review might be granted if "a federal

court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court"). Additionally, a grant of certiorari need only have commanded the votes of four Justices, not the five needed for a majority of the Court.

Further, the significance of the stays is not clear. HUD has offered no authority to show that the Supreme Court stay pending appeal in *Underwood* implies any view as to the merits. Though the second Circuit usually requires likelihood of success on the merits as a prerequisite for a stay pending appeal, *Eastern Air Lines, Inc. v. CAB,* 261 F.2d 830, 830–31 (2d Cir.1958) (adopting criteria in *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921, 925 (D.C.Cir.1958)), after the Supreme Court's stay in *Underwood,* the Second Circuit, which had previously denied a stay in this case, *supra* p. 942, had little choice but to grant one.

Even if the grants of certiorari, and the stays, did indicate a view by the Supreme Court that HUD had some substantial chance of prevailing on the merits, that view could not be controlling here. The grants of certiorari and the stays are based on preliminary analyses. A legal claim which initially appears to deserve serious consideration may on closer study appear not merely incorrect but groundless. Indeed, HUD's position had some initial appeal to this court because of an apparently similar case, *Pennsylvania v. Lynn,* 501 F.2d 848 (D.C.Cir.1974), decided in HUD's favor. *See Dubose v. Hills,* 405 F.Supp. at 1282. After detailed discussion, however, this court clearly distinguished the facts of this case from *Lynn. See id.* at 1288–92.[16] Thus, it is perfectly understandable that HUD's position, which initially appeared to have substantial merit, was in fact not substantially justified.

The view that HUD's position was not substantially justified is strengthened by the unanimous rulings of lower courts against HUD in suits across the country. *See Dubose v. Harris,* 82 F.R.D. at 585 & n. 12 (citing district and circuit opinions). Although I did state that the grants of certiorari

and the stays cast doubt upon the unanimous rejection to date of HUD's position, *id.* at 585, on reflection I conclude, for the reasons above, that this doubt was minimal. Furthermore, the government's agreement to a settlement which provided for relief to plaintiffs as great, if not greater, than what had been awarded by this court and several others, provides a strong indication that HUD itself did not consider that the government's position was substantially justified.

In sum, HUD has not established its first affirmative defense, that its position was "substantially justified."

2. *Do "Special Circumstances Makes an Award Unjust"?*

[9] The EAJA provides that no fees shall be awarded if "the court finds . . . that special circumstances make an award unjust." This provision "gives the court discretion to deny awards where equitable considerations dictate an award should not be made." House Report 11, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4990.

HUD asserts that the terms of the settlement, and the intent of the parties, make a fee award unjust. The terms of the settlement do not include a blanket prohibition of fees from any source. The Stipulation for Settlement, ¶ 3(f), provides: "None of the sums distributed may be used to pay attorney's fees." *Dubose,* 82 F.R.D. at 594. This provision bars a fee award from the settlement fund.[17] At the time of settlement, this fund represented the only known possible source of attorney fees. *See City of Detroit v. Grinnell Corporation,* 495 F.2d 448, 469 (2d Cir.1974); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 164, 59 S.Ct. 777, 778, 83 L.Ed. 1184 (1938); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391–92, 90 S.Ct. 616, 625–626, 24 L.Ed.2d 593 (1970). The parties not contemplating any other possible source of funds, did not address the attorney fee issue further.[18]

HUD contends that, if it had thought that a fee award were possible, it would not have agreed to the settlement.

This ignores Congress' intention that the EAJA apply retroactively to cases already substantially resolved, *see supra* part B. In this regard, Congress made no distinction between cases resolved by litigation to judgment and those resolved by settlement. Application of the EAJA to this settlement is therefore not patently "unjust." Although the court in *Aho v. Clark,* 608 F.2d 365, 367 (9th Cir.1979), in denying a fee award under 42 U.S.C. § 1988 employed the rationale urged by HUD, that case is distinguishable. The settlement in *Aho* was concluded after the relevant fee statute took effect, *id.* at 367, and the agreement thus, by making no provision for fees, *id.*, inferentially waived fees under that statute. Here, however, the settlement was concluded well before the EAJA took effect, and thus did not waive fees under that Act.

Jennings v. Metropolitan Government of Nashville and Davison County, 715 F.2d 1111 (6th Cir.1983), is similarly distinguishable. There, the Sixth Circuit construed a settlement agreement, which was silent as to attorney fees, as barring such fees, because "the parties intended the settlement to be a final disposition of all claims." *Id.* at 1114. The court thus disallowed fees sought under 42 U.S.C. § 1988. In *Jennings,* the relevant fee statute was in force when the settlement was reached. In the case at bar, however, the fee statute had not yet been enacted at the time of settlement, and it cannot be inferred that the parties intended the settlement to dispose of a fee claim which did not yet exist.

Although not argued by the defendents, certain aspects of attorney Sturdevant's fee request raise the possibility of "special circumstances" which would make an award unjust. Discussion of this point is deferred until part VII.

III. PLAINTIFFS' CLAIMS CONCERNING HOURS SPENT AND HOURLY RATES

[10] The EAJA instructs specifically how to compute a fee award:

> "[F]ees and other expenses" includes the reasonable

> expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.).

28 U.S.C. § 2412(d)(2)(A).

Plaintiffs contend that a multiplier should be employed to adjust upward the attorney's fees in this case.[19] I disagree. The statute does not specifically provide for a multiplier. I need not determine, however, if Congress intended to allow such an upward adjustment, because in my opinion one would not be justified in this case. The performance of counsel in this case, while quite sound, was not so extraordinary as to justify a multiplier or any higher fee. Since HUD's position was not substantially justified, there was no great risk of failure. *See also Dubose,* 82 F.R.D. at 585 n. 12 (showing uniform success of plaintiffs against HUD across the country). Further, the extremely generous settlement which counsel obtained from HUD—amounting not to a true compromise, but rather an agreement by HUD to give plaintiffs *all* that they asked for—must have arisen not by reason of plaintiffs' especially skillful bargaining, but by HUD's realization that the adverse judicial decisions left it with no bargaining chips. Finally, the settlement administration, even if performed quite well, was not primarily work of a legal nature.[20]

The court in *Underwood II* granted a multiplier of 3.5. Slip op. at 8. That court apparently inferred that it had authority to grant a multiplier from the provision that a

"special factor" could authorize an award in excess of $75 per hour. *Id.* at 2. In *Underwood,* the court was presented with a limited availability of qualified attorneys—a situation in which the statute specifically allows awards in excess of $75 per hour. Judge Pregerson explained, "This litigation was complex and protracted. Few attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by this case."

In the present case, however, this court was not faced with a similar shortage of qualified counsel.[21] As discussed *supra,* this case presented a relatively simple question of whether HUD abused its discretion in refusing to put a housing subsidy program into operation. HUD's unreasonable position made this an easy case for plaintiffs, as evidenced by the unanimous rulings of lower courts against HUD in suits across the country. *See Dubose v. Harris,* 82 F.R.D. at 585 & n. 12 (citing district and circuit court opinions). Because an unusually high degree of legal talent was not required in this case, there was no dearth of lawyers who could have achieved similar results. Therefore, the "special factor" justifying the multiplier in *Underwood* is not present in the case at bar.

In the absence of such a special factor and any extraordinary performance of counsel, I find no basis for granting a multiplier. Such an award would provide plaintiffs with an undeserved windfall. *New York State Association for Retarded Children v. Carey,* 711 F.2d 1136 (2d Cir. 1983).

Each organization or attorney claiming fees has supported its claim with affidavits by all counsel for whose work compensation is claimed. These affidavits setting forth the time, amount, and nature of the work claimed are summarized below.[22] The affidavits are all based on reconstructed time records, except for the affidavits by attorney Shay (for NLS), and that part of attorney Sturdevant's affidavits covering the period from April 1982 onward, which are based on contemporaneous time records.[23]

A. *NLS, NHLA and LASH*

[11] Three of the parties—NLS, NHLA, and LASH—have reached a partial settlement, filed with this court August 17, 1983. The parties have stipulated that, if it is ultimately determined that any award for work before this court is proper, the amount of the award shall be $2,425.50 to LASH for work by attorney Norko, $1,620.00 to LASH for work by attorney Pilver,[24] $3,577.50 to NLS for work by attorney Shay,[25] and $4,083.75 to NHLA for work by attorney Morrison,[26] for a total of $11,706.75. The parties arrived at these figures by accepting the hours and rates in the attorneys' affidavits, with some adjustments, as follows. Hours spent on the fee motion itself were omitted; the remaining hours were reduced by ten per cent; and any claimed rates above $75/hour were reduced to $75/hour. The agreement permits plaintiffs' counsel to seek additional fees, at a rate of not more than $75/hour, for work done on any future appeals initiated by HUD, but not on appeals initiated by plaintiffs. The amounts specified in the stipulation are hereby approved as reasonable. In a case so weighed down with paper, reflecting many points of dispute, the court applauds this partial settlement.

B. *CLS*

CLS claims fees for the work of attorneys Sturdevant, O'Brien, Janes, Zeldis, McCoy, Wirzbicki, Korn, Dale, and Rosenstein. CLS asserts that hourly rates according to the following table are reasonable:

years of experience	hourly rate
0	$ 40
1	50
2	60
3	70
4	80
5	95
6	110
7	110

Attorney James C. Sturdevant spent 1,312.75 hours on various tasks for this case from October 1975 through April

1978. Mr. Sturdevant graduated in 1972 from Boston College Law School and has been a member of the Connecticut bar since 1973. When assigned to handle this case, therefore, Sturdevant had less than three years' experience at the bar. He worked for CLS and its predecessor organization, Tolland-Windham Legal Assistance Program, from 1972 until 1978.

Attorney Dennis J. O'Brien spent 387 hours on various tasks for this case from August 1975 through March 1980. One hundred of these hours were spent in efforts directed at locating and informing potential claimants. Five of the hours were directed at persuading the State of Connecticut that settlement payments should not affect recipients' AFDC eligibility. O'Brien Affidavit filed Nov. 17, 1982 ¶ 10(*o*)(ii), (iii).

Attorney Norman K. Janes spent 79 hours on various tasks for this case from July 8, 1975, through November 21, 1975, and an additional five hours preparing his affidavit for this motion.

Attorney Martin Zeldis spent 34 hours on various tasks for this case from December 30, 1975, through December 1979, and an additional four hours preparing his affidavit for this motion. His work included up to five hours spent toward implementing the settlement. Zeldis Affidavit filed Nov. 15, 1982 ¶ 4(j) ("[c]lient contact, class contact, form consideration and distribution and claim collection re settlement of case, September, 1979 through December, 1979").

Attorney William E. McCoy spent 36.5 hours on various tasks for this case from January 1976 through April 1978, and an additional two hours preparing his affidavit for this motion.

Attorney John Wirzbicki states that he spent 32 hours on various tasks for this case from January 21, 1976, through December 1979, and an additional two hours preparing his affidavit for this motion. This time included up

to five hours toward implementing the settlement. Wirzbicki Affidavit filed Nov. 17, 1982 ¶ 4(i) ("[c]lient contact, form distribution and claim collection re settlement of case, September, 1979 through December, 1979").

Attorney Martin N. Korn spent 66 hours on various tasks for this case from March through June 1976, preparing filings and preparing for and attending a hearing, and an additional five hours preparing his affidavit for this motion.

Attorney D. Michael Dale states that he spent 85 hours on various tasks for this case from January 1976 through spring 1979, and an additional two hours preparing his affidavit for this motion. Up to two of the hours claimed concerned settlement implementation. Dale Affidavit filed Nov. 30, 1982 ¶ 7.

Attorney Ronald S. Rosenstein spent 62 hours on various tasks for this case from March 10, 1976, through 1979, and an additinal five hours preparing his affidavit for this motion.

C. *Sturdevant (individually)*

Attorney James C. Sturdevant claims a personal right to fees for work he performed from May 1, 1978 through December 1982. Mr. Sturdevant spent 2,294.25 hours on various tasks for this case during that time. He claims hourly rates according to the same table as that used by CLS, *supra* p. 954.

D. *San Fernando*

San Fernando claims that fees for part of the work set forth in Sturdevant's fee motions should be paid to it and not to Sturdevant. The work in question is that done from October 9, 1978, through April 30, 1980, during which time Sturdevant was a full time employee of San Fernando. Of the 2,294.25 hours claimed by Sturdevant individually in his motion, 1,329.5 fall during this time period.

As to the amount of any fee award involved, San Fernando relies on Sturdevant's statements of his hours and his claims regarding appropriate hourly rates. This dispute between San Fernando and Sturdevant will be discussed in section VI *infra*.

IV. THE COMPENSABILITY OF THE HOURS CLAIMED

A. *Categories of Noncompensable Work*

[12] Various categories of work are noncompensable. These include settlement administration, lobbying, work on reasonably separable issues on which plaintiffs did not prevail, defense of the settlement against project owners, and work on fee motions. Further, a penalty is appropriate for the use of reconstructed time records.

1. *Settlement Administration*

No fees may be awarded for "settlement administration" (defined *supra* p. 944) because the Stipulation for Settlement bars such fees. Although paragraph 4(d) of the Stipulation, reported at 82 F.R.D. at 595, states that HUD would provide certain items to aid in settlement administration—a franking privilege, a WATS line, and payment for the cost of assembling and copying documents requested of PW by HUD for auditing purposes—the paragraph then concludes: "It is the intent of the parties that distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD." This provision rules out payment by HUD of attorney fees for work in settlement administration, even though such fees might otherwise be proper, *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1111 (N.D.Ill.1983); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F.Supp. 680, 695 (D.Minn.1975).[27]

[13] Almost all of Sturdevant's activities as a member of the COC are thus not compensable.[28] The sole exception has to do with motions which concerned the legal interpretation of the agreement rather than the mechanics of dis-

tribution. Plaintiffs have called attention to four such motions. First, for the 25 per cent of the projects in which HUD had no data on the "gap" values (values for increases in the property taxes and utility costs), plaintiffs moved to use a statistical regression formula to estimate these values. Second, plaintiffs moved to have that formula applied to projects for which HUD had supplied data indicating zero or negative "gap" values. Third, plaintiffs moved that the minimum recovery for any eligible claimant should be $20. Fourth, when HUD moved that the principal remaining in the reserve fund after payments were made (about $15 million) be returned to HUD, plaintiffs requested that HUD be required to obligate that money promptly for operating subsidies mandated by 1977 legislation. In all four cases, plaintiffs prevailed. Work on these motions is therefore compensable.[29]

2. *Lobbying*

Hours spent lobbying Congress, as well as federal and state agencies, are not compensable. The EAJA provides for fees "incurred . . . in any civil action." Lobbying, even if related to the suit, is not such an expense. Further, the Act's purpose was to provide compensation for the "vindication of . . . rights in civil actions and in administrative proceedings," as distinguished from enlargement of remedies through the legislative process. EAJA § 202(a), 94 Stat. 2325.

Even lobbying HUD itself is not compensable. While negotiating with HUD's counsel, or with other HUD officials at their direction, is within the ambit of litigation, other contacts with HUD personnel concerning HUD's position in the litigation are not.

3. *Work on Reasonably Separable Issues On Which Plaintiffs Did Not Prevail*

The plaintiffs may be considered prevailing parties in this action because they achieved many of the benefits sought in bringing suit. *Hensley v. Eckerhart,* —U.S. —, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). Nevertheless,

no fees should be awarded for work on issues on which plaintiffs did not prevail, if such issues are reasonably separable from or unrelated to the rest of the case.

As the Supreme Court recently explained:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants—often an institution and its officers, as in this case—counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." *Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Hensley v. Eckerhart, 103 S.Ct. at 1940.[30]

In this suit, plaintiffs initially claimed not only that HUD should fund the operating subsidy program, but also that certain rent increases authorized by HUD were improper. Plaintiffs did not pursue this second claim.[31] Accordingly, no fees may be awarded for work on this claim.

HUD also points to unsuccessful procedural motions by plaintiffs, such as their motion to the Supreme Court to vacate the stay imposed by the Second Circuit. These motions are not sufficiently separable from the case as a whole to warrant any denial of fees for work on them. Additionally, the results obtained in this case—an agreement by HUD to give plaintiffs *all* they asked for—makes this request reasonable.

4. *Defense of the Settlement Against Project Owners*

Fees should not be awarded for work on issues in which HUD did not oppose plaintiffs. *Cf. Firebird Society v. Mem-*

bers of Board of Fire Commissioners, 433 F.Supp. 752, 755 (D.Conn.1976), *aff'd,* 556 F.2d 642 (2d Cir.1977) (per curiam); *Vulcan Society of Westchester County v. Fire Department,* 533 F.Supp. 1054, 1061 (S.D. N.Y.1982) In this case, some project owners opposed the settlement agreed to between HUD and plaintiffs. Plaintiffs' work in defending the settlement agreement against this challenge is thus not compensable.

5. *Work on Fee Motions*

In *Carey,* the Second Circuit held that, because the use of reconstructed time records had complicated both sides' effort on the fee motion, an award of fees for time spent on the fee motion itself was inappropriate. 711 F.2d at 1148. The same reasoning applies here. Almost all of the time records submitted by plaintiffs in this action are reconstructed, *see supra* p. 953, and their use not only has cost plaintiffs considerable time in reconstructing these records, but also has substantially increased the argument, and the level of confusion, on these motions. Accordingly, fees for work on fee motions will be denied.

6. *Penalty for Use of Reconstructed Time Records*

[14] All otherwise allowable hours will be reduced by ten per cent if they are based on reconstructed time records. This penalty follows the practice of *Ross v. Saltmarsh,* 521 F.Supp. 753, 761–62 (S.D.N.Y. 1981), *aff'd,* 688 F.2d 816 (2d Cir.1982) (fee award under 42 U.S.C. § 1988). *Cf. Hensley v. Eckerhart,* 103 S.Ct. at 1942 n. 13 (district court's reduction of attorney's hours to account in part for his failure to keep contemporaneous time records was held proper).

B. *HUD's Other Objections Rejected*

Except as noted in part A above, the hours claimed were reasonably spent for compensable work and reasonable in light of the level of success achieved. *Id.* at 1942.

HUD complains that attorney Sturdevant spent considerable time in conferences both with attorneys involved

in this action and attorneys involved in similar actions outside the state. Given the multiplicity of suits across the country, coordination among counsel was necessary and reasonable. *Cf. Copeland vs. Marshall (Copeland III)*, 641 F.2d 880, 904 (D.C.Cir.1980) ("The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in a response." (footnote omitted)). Indeed, such coordination may have contributed substantially to plaintiffs' success nationwide in the operating subsidy cases, and such uniform success may have paved the way for the settlement eventually achieved.

HUD complains also of the time spent by Sturdevant in following the progress of the settlement in *Abrams* (on which settlement the settlement in this action depended, *see supra* p. 943), and in submitting amicus briefs, on behalf of the plaintiffs in this action, to the courts in *Underwood*, *Ross*, and *Abrams*.

HUD points to the provision in the EAJA that fees shall be awarded for expenses "incurred by th[e] party in any civil action (other than cases sounding in tort) brought by or against the United States *in any court having jurisdiction of that action*," 28 U.S.C. § 2412(d)(1)(A) (emphasis added). HUD asserts that expenses incurred for amici briefs submitted to the courts in *Underwood*, *Ross*, and *Abrams* were not "incurred . . . in any court having jurisdiction of th[is] action." However, these amici briefs were reasonably necessary to protect the interests of plaintiffs in this action, and as such they were reasonably incurred in pursuing litigation before this court.

V. THE APPROPRIATE HOURLY RATES

[15] The rates claimed by plaintiffs reasonably reflect the value of their services. In this determination, historic rather than current rates are to be used. *Carey*, 711 F.2d at 1152–53. Therefore, the historic hourly rates claimed by plaintiffs will be allowed, subject to a ceiling of $75/hour.

The EAJA's $75/hour fee limit applies "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). Since fees are sought almost entirely for work done before the Act's effective date, it would be illogical to award a higher rate based on "an increase in the cost of living." I interpret the exception for "the limited availability of qualified attorneys" to apply only when the party, because of such limited availability, has actually paid in excess of $75/hour. Accordingly, that exception does not apply here, where the clients are non-fee-paying. Plaintiffs have suggested no other "special factor" which would justify an exception to the $75/hour limit. Accordingly, that limit applies.

VI. THE DISPUTE BETWEEN STURDEVANT AND SAN FERNANDO

[16] The dispute between Sturdevant and San Fernando presents this court with a question of first impression—whether a former legal services lawyer who "took a case with him" upon leaving a legal services organization may be awarded fees for work done on the case thereafter. This issue is one with implications extending well beyond the financial fortunes of James Sturdevant.

For the sake of analysis, Sturdevant's fee requests may be viewed in three separate periods. First, from May 1, 1978 through October 8, 1978, when Sturdevant had left CLS but was not yet on the San Fernando payroll. Second, when Sturdevant worked for San Fernando from October 9, 1978 through April 30, 1980. Third, from May 1, 1980 until the present, when Sturdevant has been in private practice. I turn first to the second of these periods.

A distinction has to be drawn between whether services rendered are properly chargeable as costs (already considered in section IV *supra*) and who is entitled to receive such fees, the question next considered. From October 9, 1978 through April 30, 1980, attorney Sturdevant was a full time

employee of San Fernando. Both Sturdevant and San Fernando claim the right to any fees for Mr. Sturdevant's work during this time. CLS has assigned to San Fernando any right which CLS may have to fees earned during this contested period.

A. *The Nature of the Dispute*

Mr. Sturdevant first began working on this case in October 1975 as an employee of the Tolland-Windham legal Assistance program (TWLAP), which later merged into Connecticut Legal Services (CLS), one of the fee claimants in this action.[32] O'Brien Affidavit (filed June 20, 1983) at 2–5. Initially, attorney Dennis O'Brien was lead counsel in this case. Starting in 1976, this position was turned over to Sturdevant who by that time had become CLS' Housing Task Force Director. *Id.* ¶¶ 15, 16, 20. At the end of April 1978, Sturdevant resigned from CLS and moved to California. O'Brien succeeded Sturdevant as CLS' new Housing Task Force Director. *Id.* ¶ 21.

Sturdevant contends that incidental to his relocation there was a realignment of lawyer-client relationship which established him as the private attorney for the plaintiffs. There are very strong reasons to believe that such an arrangement not only did not occur, but was never even contemplated.

Before Sturdevant's departure, O'Brien, on behalf of CLS, permitted Sturdevant to continue to act as counsel in this action after his leaving CLS. O'Brien did so because Sturdevant seemed clearly the best attorney at hand for that role, and there seemed nothing improper with Sturdevant's working on the case while employed by San Fernando. O'Brien was under the impression that Sturdevant would begin his employment with San Fernando immediately after he left CLS. He states that, had he known that Sturdevant would work on this case as a private attorney and later personally claim attorney fees for work done while a San Fernando employee, O'Brien would not have agreed to allow Sturdevant to take this case with him when he left CLS.[33]

In fact, Sturdevant did not start work with San Fernando immediately, but instead commenced work on October 9, 1978, pursuant to an agreement made with San Fernando in January 1978. Fee Hearing Transcript (June 1–2, 1983) 119–20; Sturdevant Declaration (Exhibit A to Memorandum of Law in Support of Supplemental Motion of James C. Sturdevant for an Award of Attorneys' Fees for the Period April 5, 1979 through December, 1982, filed Feb. 23, 1983) ¶¶ 7, 9–10. Thus, from May 1, 1978, through October 8, 1978, even though he was not on the payroll of any legal services agency, Sturdevant continued to function as counsel in this case. In this capacity, he participated in settlement negotiations with HUD. Fee Hearing Transcript at 120.[34] Neither HUD nor any Connecticut counsel questioned Sturdevant's authority to do so. *Id.* at 121.

On October 9, 1978, about five months after he had left CLS, Sturdevant started work with San Fernando. The terms of this employment are in dispute. Sturdevant contends that, when he accepted the offer, it was his understanding that he would continue as lead counsel in *Dubose* in his own right, in addition to fulfilling his responsibilities as a San Fernando employee. He claims to have understood that he would be permitted to use San Fernando's supplies and clerical personnel for *Dubose,* but that San Fernando would not be responsible for his actions in *Dubose.* Sturdevant Declaration (Exhibit A to Memorandum of Law in Support of Supplemental Motion of James C. Sturdevant for an Award of Attorneys' Fees for the Period April 5, 1979 through December, 1982, filed Feb. 23, 1983) ¶ 10. This version is disputed by the three people from San Fernando involved in Sturdevant's hiring whose understanding was that Sturdevant would continue to work on the *Dubose* case as a San Fernando employee. Declaration of Percy Anderson and David Pettit (in Feb. 22, 1983 filing by San Fernando); Sun Deposition of October 8, 1982, taken in *Underwood v. Pierce,* eleventh page of text (pages are unnumbered in this court's copy); *see also* Fee Hearing Transcript at 124 (identifying those involved in hiring Sturdevant). On May 1, 1980, Sturdevant left the employ San Fernando.

As evidence that *Dubose* was his private case, Sturdevant asserts that he was the only attorney who worked on the case; that he took the case files with him when he left San Fernando; that he personally incurred out-of-pocket expenses connected with the case; that others at San Fernando were not interested in the case; and that San Fernando had disclaimed liability for any possible malpractice by Sturdevant.

San Fernando replies, *inter alia,* that Sturdevant included *Dubose* in reports of San Fernando's activities; that, in connection with the case, Sturdevant publicly identified himself, and was identified by others, as a "San Fernando" or "legal aid" lawyer;[35] that Sturdevant was reimbursed for his expenses from the settlement fund by the *Underwood* court; and that San Fernando had an interest in the *Dubose* case, both because it affected many of San Fernando's clients and because San Fernando was co-counsel in a related action, *Sicuro v. Hills,* brought in the Central District of California.

Sturdevant and San Fernando agree that Sturdevant was a full time employee of San Fernando from October 9, 1978 through April 30, 1980. Reply Memorandum Objecting to Admissibility of Affidavit of Cynthia Padilla (filed Aug. 26, 1983) at 2. While Sturdevant worked at San Fernando, he reported time spent on *Dubose* on his time sheets, and he received credit for this time just as for time spent on other cases. Sturdevant Deposition of Jan. 18, 1983 at 56–60. For this period of about a year and a half, Sturdevant claims (conservatively, as he states) 1,329.5 hours for work on *Dubose.*

B. *Factual Conclusions*

As a factual determination, I find that there was no agreement among the parties that Sturdevant take the case as an individual practitioner. O'Brien's statement that he would not have agreed to let Sturdevant take *Dubose* with him when he left CLS had he known Sturdevant would claim it as a private case is accepted as true. Further, all

of the persons having any connection with Sturdevant's transfer from CLS to San Fernando deny that any such arrangement was discussed or agreed to.[36]

Additionally, the contention that when Sturdevant left CLS in May 1978 he intended to take on the case in his individual capacity is open to question. Sturdevant asserts that his right to fees for services performed was created when he accepted the case as an individual practitioner rather than as a member of any legal service organization. The difficulty with Sturdevant's argument is that it rests on the assumption that he has the power of clairvoyance. The time during which Mr. Sturdevant was allegedly attempting to treat the *Dubose* case as his own—after May 1, 1978—was more than two years prior to the passage of 28 U.S.C. § 2412(b) (Oct. 21, 1980). Thus, Sturdevant could not have known of the attorney fees which would ultimately be available pursuant to the EAJA. Hence, while today it is understandable that Sturdevant wishes to characterize the case as his own—to do so is to put money in his own pocket—it is puzzling what motive Sturdevant would have had in 1978 for claiming individual responsibility for *Dubose*.

C. *The Law Regarding the Dispute*

San Fernando received funding from the Legal Services Corporation. The Legal Services Corporation Act of 1974, as amended, provides that the Corporation shall

> insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law, and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation.

42 U.S.C. § 2996f(a)(4) (1976). Mr. Sturdevant does not dispute that during the time in question he was "employed full time in legal assistance activities supported in major part by the Corporation." *See, e.g.*, Memorandum of Law in Support of Supplemental Motion of James C. Sturdevant for an Award of Attorneys' Fees for the Period April 5, 1979

through December, 1982 (filed Feb. 23, 1983) 14–18. There can be no doubt that section 2996f(a)(4) thus applies to Mr. Sturdevant's work while he was on the San Fernando payroll.

The statute is clear. Compensated outside practice is prohibited; uncompensated outside practice is permitted only as authorized by the Corporation. This plain meaning is confirmed by the accompanying House Report.

> Attorneys employed full-time in legal services activities paid for by the corporation will be prohibited from engaging in any outside practice of law for compensation. It is expected that such attorneys, however, will be permitted to handle uncompensated legal work for thier families, church groups, community organizations, and other parties so long as their uncompensated work does not interfere with their responsibilities to provide first-rate legal assistance to the poor in accordance with this bill.

H.R.Rep. No. 247, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 3872, 3880. And again:

> [the section provides] the insurance [*sic*] that attorneys employed full time by the legal assistance program refrain from any outside practice of law for compensation; and also that attorneys employed full time in legal assistance activities refrain from uncompensated outside practice of law except that deemed appropriate in guidelines promulgated by the corporation.

Id., reprinted in 1974 U.S.Code Cong. & Ad.News at 3890.

D. *Legal Conclusions*

The clear meaning of 42 U.S.C. § 2996f(a)(4) prohibits compensated outside practice of law and thus bars Mr. Sturdevant's claim.

Sturdevant, however, relies on a Corporation regulation which purports to permit compensated outside practice of law by an "attorney [who] is newly employed and has a professional responsibility to close cases from a previous

law practice, and does so as expeditiously as possible." 45 C.F.R. § 1604.4 (1982). The Legal Services Corporation (LSC) however "has consistently maintained that [45 C.F.R. § 1604.4] was intended to apply to matters that the attorney began while he or she was in private law practice, for clients who would not be eligible for legal services—not for matters for clients eligible for legal services begun while the attorney was employed by another legal services program," citing transcript of April 26, 1976, meeting of Legal Services Corporation Board of Directors where the proposed Part 1604 was described by the Board's Committee on Regulations. Amicus Curiae Memorandum of the Legal Services Corporation, filed Dec. 9, 1982, at 5 n. 4. Considerable weight is given to the LSC's interpretation of 45 C.F.R. § 1604.4. *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980) ("An agency's construction of its own regulations has been regarded as especially due . . . respect.").[37]

Even if the court were to adopt a construction of the regulation that was favorable to Mr. Sturdevant, such a regulation would be invalid because it would conflict with the statute, which prohibits *all* compensated outside practice of law. Accordingly, an agreement between Mr. Sturdevant and San Fernando which purported to allow Mr. Sturdevant to retain any fees awarded for his work in this action would be void.

E. *Policy Conclusions*

Mr. Sturdevant's attempt to use legal service program resources for his own enrichment is opposed in the amicus brief submitted by the Legal Services Corporation where it states: "for legal services attorneys the personal rewards of [their clients'] victories are limited to the knowledge that poor people's rights have been vindicated. . . ." Paradoxically the award of personal fees to public service lawyers would destroy the motive of public service lawyers to fight for the rights of the poor against the "entrenched bureaucracy." The rejection by Sturdevant of that virtuous motive may not be enough by itself to require that he be denied

fees. In addition, however, a decision to grant Sturdevant's fee request would undercut the major justification for the granting of fee awards to legal service organizations. Defendants in attorney's fee cases have long contended that it is inappropriate to make awards to legal aid organizations which already receive public funding. The "argument is that 'double payment' is 'somehow unfair.' " *Dennis v. Chang*, 611 F.2d 1302 (9th Cir.1980). Courts have rejected these arguments, noting that such fee awards were contemplated by Congress and that "[f]ee awards in civil rights cases encourage legal service organizations to pursue such litigation because the awards permit replenishment of the funds available for the organization's work." *Dennis v. Chang*, 611 F.2d at 1306. *See also Palmigiano v. Garrahy*, 616 F.2d 598, 602 (1st Cir.1980) (public interest law firm "has finite resources, and a full fee award will enable it to undertake further civil rights litigation"). Endorsing this view, *see, e.g., New York State Association for Retarded Children v. Carey*, 711 F.2d at 1149 n. 8, the Second Circuit went on to state:

> we think it appropriate to end the uncertainty as to whether the fees of non-profit law offices will or will not be proportionately reduced to reflect the share of their budgets reimbursed by public funding, and we conclude that such reductions should not be made.

Id. at 1152.

Sturdevant, like the legal service organizations described *supra*, received public funds in the form of his salary and support staff from San Fernando during the period for which he now asks for fees for himself. An award to Sturdevant, in contrast to a legal services organization, will not replenish funds to vindicate the rights of the poor. Such monies would go for the private benefit of a for-profit attorney rather than to a publicly accountable organization. An award to Sturdevant in this case would indeed be a "windfall."

VII. THE PERIODS DURING WHICH ATTORNEY STURDEVANT WORKED ON THIS CASE WHILE CLAIMING TO BE SELF-EMPLOYED

[17] Sturdevant represents that he was self-employed during two periods of time when he worked on this case. No other counsel for plaintiffs challenge Sturdevant's personal right to fees for work done during these times; and, indeed, there is no evidence that he was on anyone else's payroll. This court, however, does not share such an easy attitude toward his petition for an award. During the first period in question—from May 1, 1978, through October 8, 1978—Sturdevant had left CLS but had not yet started his employment with San Fernando.[38] *See supra* pp. 960–961 & note 34. The second period runs from May 1, 1980, the date of Sturdevant's departure from San Fernando, until the present.

I find that general considerations of equity do not justify an award of any fees to Sturdevant for the time spent on *Dubose* while he was "self-employed." Section 2412(d)(1)(A) of the EAJA prohibits an award of fees if "special circumstances make an award unjust." The legislative history of the section clarifies the meaning of "special circumstances."

> Furthermore, the Government should not be held liable where special circumstances would make an award unjust. This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. *It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.*

H.R.Rep. No. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S.Code Cong. & Ad. News 4953, 4984, 4990 (emphasis added). As the Second Circuit explained in *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir.1983), "The EAJA thus explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees by a prevailing party." That case ruled that an applicant will be denied fees if he stands before the court without clean hands.

In ruling on Sturdevant's fee motion it is necessary to consider his actions during the entire litigation.

> In viewing applications for such awards in the context of general equitable principles, we are not required to limit our scrutiny to a single action or claim on which the applicant succeeded but must view the application in light of all the circumstances.

Id. at 99.

Sturdevant claims that he intended to represent the *Dubose* plaintiffs in his private capacity beginning with the date of his departure from CLS. At various relevant times, however, Sturdevant failed to disclose this intent to CLS, San Fernando, Judge Pregerson or this court.

Sturdevant's plan for taking the case privately was never disclosed to O'Brien of CLS. As he explained in his affidavit:

> When I agreed to permit Mr. Sturdevant to continue to serve as lead counsel for the plaintiffs in the *Dubose* cases for which CLS was responsible subsequent to April 30, 1978, I had no idea whatsoever that Mr. Sturdevant would ever work on them in the capacity of a private attorney. The thought of any such contingency never occurred to me. All I knew was that Mr. Sturdevant was going to work for SFVNLS.

O'Brien Affidavit ¶ 25.

At the June 1, 1983 hearing, O'Brien reiterated that he had not intended for Sturdevant to ever handle the case as a private attorney.

> MR. STURDEVANT: No, I'm making the statement in support of my contention which Mr. O'Brien agrees with that Connecticut counsel looked to me to represent the class, not to anyone else.
>
> THE COURT: That's all right, I understand that. But you could represent the class but not [in] a private capacity. I don't understand Mr. O'Brien agreeing to that.

MR. O'BRIEN: No.
Fee Hearing Transcript at 122–23.

I find that it was never O'Brien's intent to ever let Sturdevant take the *Dubose* case in his personal capacity. If Sturdevant had ever disclosed his true intent, O'Brien would never have allowed the case to be transferred from CLS. It would be inequitable to allow Sturdevant's lack of frankness to give him the opportunity for personal enrichment.

Similarly, Sturdevant's dealings with San Fernando were less than forthright. As mentioned *supra,* the three San Fernando employees involved in Sturdevant's hiring had been led to believe that Sturdevant would be working on the *Dubose* case as a San Fernando employee. Thus, for almost 19 months Sturdevant accepted his full salary from San Fernando without informing that organization that 30 to 40 per cent of his time was devoted to a case he considered to be his own.

Lastly, Sturdevant, either confused or misled this court and the *Underwood* court as to his affiliation. As noted earlier, Sturdevant signed the stipulation for settlement approved by this court as "James C. Sturdevant, San Fernando Valley Neighborhood Legal Services." *Dubose,* 82 F.R.D. at 605. If Sturdevant in fact meant to be representing the *Dubose* plaintiffs in his personal capacity, such a signature was misleading to this court.

Similarly, although after May 1, 1980 Sturdevant was no longer in the employ of San Fernando, the *Underwood* court was not informed of this change in Sturdevant's employment. As far as the *Underwood* court could tell from its records, San Fernando, not Sturdevant, was representing the *Dubose* plaintiffs throughout the period in question. Reporter's Transcript of Proceedings on October 14, 1982 in *Underwood* (RT) (included in part in Feb. 22, 1983 filing by San Fernando) 58:22—59:4 (Judge Pregerson stated, "I think that the Court's records show that San Fernando Val-

ley Neighborhood Legal Services was as an organization, through Mr. Sturdevant, counsel of record in this matter"); *id.* 73:21–24 (Sturdevant stated, "I don't recall any document that was specifically filed with this court identifying the contractual relationship between me and San Fernando"). When he left San Fernando, instead of giving the court explicit notification Sturdevant simply filed changes of address. *Id.* at 72–74. So far as the *Underwood* court was concerned, therefore, the status of Sturdevant and San Fernando vis-a-vis this case remained the same. Not until the hearing of October 14, 1982 was the record set straight. *See id.*

If it is assumed that Sturdevant intended to take *Dubose* as his own, he was less than forthright in relaying this intent to others. Alternatively, if Sturdevant had no such intention, he has been duplicitous in his recharacterization of those events to this court. In either case, Sturdevant's conduct calls for a denial of his fee request.

My ruling that it would be inequitable to grant fees to sturdevant personally does not detract from the fact that services have been performed which could justify an award. However, neither San Fernando nor CLS have claimed an interest in fees earned during the two periods during which Sturdevant was self-employed. Further, the plaintiffs in this case are not harmed by a failure to award fees because they have not incurred any costs. It is not for this court to make an award based on issues that the parties have neither raised nor defined. I therefore forego the opportunity to intermeddle by creating a claim where none exists.

VIII. THE FEE AWARDS

A. *NLS, NHLA, and LASH*

NLS, NHLA, and LASH are awarded amounts totaling $11,706.75, per stipulation of parties, as explained in section III. NLS is awarded $3,577.60 for the work of attorney Shay; NHLA is awarded $4,083.75 for the work of attorney Morrison; and LASH is awarded $2,425.50 for the work of attorney Norko plus $1,620 for the work of attorney Pilver, for a total of $4,045.50.

B. *CLS*

[18] CLS is awarded a total of $114,810.75 for the work of its various attorneys, computed as follows:

	hours allowed	less 10% for time reconstruction	hourly rate	award
O'Brien				
1975	95	84.6	$70	$ 5,922.00
1976	126	113.4	75	8,505.00
1978–1979	62	55.8	75	4,185.00
				18,612.00
Janes				
1975	73	65.7	70	4,599.00
Zeldis				
1975	.5	.45	70	31.50
1976	26.5	23.85	75	1,788.75
1979	2	1.8	75	135.00
				1,955.25
McCoy				
1976	25.5	22.95	40	918.00
1977	7	6.3	50	915.00
				1,233.00
Wirzbicki				
1976	27	24.3	40	972.00
Korn				
1976	66	59.4	60	3,564.00
Dale				
1976	85	76.5	40	3,060.00
Rosenstein				
1976	56	50.4	50	2,520.00
1978	6	5.4	70	378.00
				2,898.00
Sturdevant				
1975	73.75	66.375	70	4,646.25
1976	515.75	464.175	75	34,813.12
1977	367	330.3	75	24,772.50
1978–1 (1/1–4/30)	202.75	182.475	75	13,685.63
				77,917.50

C. *San Fernando Valley Neighborhood Legal Services*

[19] San Fernando Valley Neighborhood Legal Services is awarded a total of $15,187.50 for the work of attorney Sturdevant, computed as follows:

	hours allowed	less 10% if time was reconstructed	hourly rate	award
Sturdevant				
1978–3 (10/9–12/31)	105.5	94.95	$75	$ 7,121.25
1979–1 (1/1–4/4)	91.5	82.35	75	6,176.25
1979–2 (4/5–12/31)	28	25.2	75	1,890.00
1980–1 (1/1–4/30)	0	0	75	0.00
				15,187.50

D. *Attorney Sturdevant*

No award will be made to Mr. Sturdevant personally.

HUD may pay the awards to NLS, NHLA, LASH, CLS, and San Fernando "from any funds made available to the agency, by appropriation or otherwise, for such purpose." 28 U.S.C. § 2412(d)(4)(A). If HUD does not pay such awards, they shall be paid by the government in the same manner as final judgments. *Id.*

The foregoing opinion constitutes the court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

SO ORDERED.

ENDNOTES

1. Technically, only plaintiffs, not their counsel, may move for attorneys' fees. *Oguachuba v. INS*, 706 F.2d 93, 97–98 (2d Cir.1983); *but see Ceglia v. Schweiker*, 566 F.Supp. 118, 120 n. 1 (E.D.N.Y.1983). However, the real actors in these fee motions are plaintiffs' counsel, and it will at times avoid confusion to consider counsel as the real "moving parties."

2. The "National Housing Act" refers to Chapter 13 of Title 12, United States Code, found at 12 U.S.C. §§ 1701 *et seq.* *See* 12 U.S.C. § 1701 (1976) (short title).

3. Section 212 of this Act contained the new subsidy program (codified at 12 U.S.C. §§ 1715z-1(f)(3) and (g) (Supp. IV 1974)).

4. 12 U.S.C. § 1715z-1(f)(3) (Supp. IV 1974) provided:

> For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

5. 12 U.S.C. § 1715z-1(g) (Supp. IV 1974) provided:

> The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal

year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

6. Appended to the Stipulation, *see* Stipulation n. 2, was a prior Settlement Agreement, which is reproduced at 82 F.R.D. at 599–605.

7. A tenant did not have to be a member of the class certified in *Underwood, Dubose, Ross,* or *Abrams* in order to collect. A tenant in a class in any similar action could elect to participate in this settlement. Stipulation ¶ 3(a).

8. In some cases, project owners, rather than passing tax and utility cost increases on to tenants, had absorbed the increases themselves. In such cases, payments would be made to the project owners rather than the tenants. Stipulation ¶ 3(d).

9. HUD agreed that benefits paid out under the settlement would "not be included as income, resources or assets under any HUD program where eligibility or continued eligibility is defined in terms of a family's or individual's income, resources or assets." HUD further agreed to "urge" the Department of Agriculture, and the Department of Health, Education and Welfare, that they not treat payments under the settlement as "income, resources or assets in determining eligibility for governmental benefits in any program administered by these Departments." Stipulation ¶ 8(b).

10. *See contra Commissioners of Highways v. United states,* 684 F.2d 443, 444–45 (7th Cir. 1982) (reasoning that waivers of sovereign immunity must be strictly construed, court held that mere pendency of appeal from denial of attorney fees did not render the action "pending").

11. *Cf. New York State Association for Retarded Children v. Carey,* 711 F.2d 1136 (2d Cir. 1983). In *Carey,* a consent decree was signed April 30, 1975. The district court retained jurisdiction and "regularly" handled subsequent litigation concerning interpretation and enforcement of the decree. In 1976, while these supplemental proceedings were being handled, the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 (Supp. IV 1980), took effect. *Id.* at 1139–40. The Second Circuit held that the ongoing supplemental proceedings were sufficient to render the entire action "pending" for the purpose of a fee award. *Id.* at 1144–45.

12. An exceptional case might contain more than one final judgment. In such a case, fee requests for work done in an early phase of the case may be stale if delayed until judgment in a later phase. *Cf. Wheeler v. Durham City Board of Education,* 585 F.2d 618, 621–23 (4th Cir. 1978) (awards under 42 U.S.C. § 1988 and 20 U.S.C. § 1617). *See generally, Carey,* 711 F.2d at 1145.

13. This language was taken from Federal Rule of Civil Procedure 37 (discovery sanctions). *See* House Report 13, 18, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4992, 4997.

14. Further, the provision for denial of fees if "special circumstances make an award unjust" is designed in part "to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." House Report, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4990. *But see Spencer v. NLRB*, 712 F.2d at 558–59 (when government attempts to change settled law, randomly chosen party to government's test suit deserves compensation).

15. The analysis of the District of Columbia Circuit in *Spencer*, 712 F.2d at 552–53; *see also id.* at 546–47 (noting split of authority), as to the meaning of "the position of the United States" and "substantially justified" far surpasses, in thoroughness and insight, any other analysis of which this court is aware. *See also Bennett v. Schweiker*, 543 F.Supp. 897, 898–99 (D.D.C. 1982), and *Wolverton v. Schweiker*, 533 F.Supp. 420, 424–25 (D.Idaho 1982). In those cases, the court had reversed an agency action because it was not based on substantial evidence. In dealing with a fee motion under the EAJA, the court considered whether the agency was nevertheless substantially justified in making the claim to the court that substantial evidence existed to support its decision.

16. This court's opinion also showed that Congress had manifested strong disapproval even of the *Lynn* result. 405 F.Supp. at 1289–90.

17. Further, any residue left in the fund after claims were paid was to be returned to HUD's reserve fund. *Dubose v. Harris*, 82 F.R.D. at 594 (Stipulation ¶ 3(e)).

18. *But see Dubose*, 82 F.R.D. at 595 (Stipulation ¶ 4(d) (Stipulation did by implication bar fees for work on settlement administration)).

19. Multipliers have been allowed under the common fund theory, *e.g., City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 471 (2d Cir. 1974), and under statutes providing for recovery of "reasonable attorneys' fees" in civil rights cases, *Cohen v. West Haven Board of Police Commissioners*, 638 F.2d 496, 505 & n. 15 (2d Cir. 1980).

20. *Cf. Hensley v. Eckerhart*, ___ U.S. ____, 103 S.Ct. 1933, 1940 n. 9, 70 L.Ed.2d 40 (1983). The Supreme Court noted that in the decision to adjust fees upward or downward, the district court may consider factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974) to the extent they are not subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. Included in the factors in *Johnson* are the skill requisite to perform the legal service properly and the novelty and difficulty of the questions and the time and labor required. "It is appropriate to distinguish between legal work . . . and work which can often be accomplished by non-lawyers." 488 F.2d at 717–18.

21. The qualifications required of the *Dubose* counsel and the availability of qualified counsel as relating to Mr. Sturdevant is discussed at note 32 and pages 959 *et seq. infra.*

22. The documents in the record which spell out plaintiffs' claims are unfortunately spread far and wide. The reader is referred to docket entries 145, 161, 162, 164, 166–170, 174, 179, 189, 199–201, 203, and 246 in *Dubose v. Pierce,* No. H–75–303; docket entries 47–49 in *Morales v. Pierce,* No. N–76–44; docket entry 42 in *Grundman v. Pierce,* No. H–76–160; docket entry 40 in *Pleasant v. Pierce,* No. H–76–26; and docket entry 77 in *Johnson v. Pierce,* No. H–76–109. The *Dubose* docket is being used as a master docket for the eight consolidated actions, and any further submissions should be under that caption.

23. The Second Circuit has prospectively converted its "previously expressed preference for contemporaneous time records, *McCann v. Coughlin,* 698 F.2d 112, 131 (2d Cir.1983); *In re Hudson & Manhattan R.R. Co.,* 339 F.2d 114, 115 (2d Cir.1964), into a mandatory requirement, as other Circuits have done [citations]." *Carey,* 711 F.2d at 1147. Any claims for fees for "work done after the date of this opinion [June 19, 1983]" must be supported with contemporaneous time records. *Id.* at 1148.

24. Mr. Norko states that he spent 38.5 hours on this case preparing papers filed on October 29, 1975, November 12, 1975, and March 25, 1976. In 1975, Mr. Norko had four years of experience. LASH originally claimed a rate of $70/hour.

Ms. Pilver states that she spent 36 hours on this case preparing papers filed on October 29, 1975, November 12, 1975, February 27, 1976, March 25, 1976, and June 28, 1976. In 1975, Ms. Pilver had three years of experience. LASH originally claimed a rate of $50/hour.

25. Ms. Shay, who has been in legal services practice since 1963, states that she spent 53 hours on various tasks for this case from October 6, 1975 through June 11, 1976. NLS originally claimed a rate of $100/hour.

26. Mr. Morrison, who practiced with NHLA from 1973 until 1982, states that he spent 60.5 hours on various tasks for this case from January 1976 through August 1976. NHLA originally claimed a rate of $125/hour.

27. Sturdevant and San Fernando assert that in some cases HUD failed to perform its duties under the settlement agreement, and that Sturdevant at times did what should have been HUD's work. For example, they assert that HUD did not perform its obligations regarding posting and distributing notices in projects, and that as a result Sturdevant spent time to ensure that such notices were posted and distributed. Plaintiffs argue that HUD should not be able to rely on the agreement's provision limiting its expenditures on settlement administration to shield it from the effects of its breach of other parts of the agreement.

This argument has some appeal. However, Sturdevant and San Fernando have not shown that the *Underwood* court authorized Sturdevant to do these extra tasks. Without a showing of such authorization, I cannot tell whether such tasks were necessary, or were, rather, gratuitous intermeddling. Therefore, compensation for such tasks will be denied.

28. Certain tasks, such as seeking ruling regarding the taxability of the interest accumulated by the settlement fund, and trying to convince federal and state agencies that payments under this settlement should not count as income for the purpose of evaluating claimants' eligibility for various aid programs, were ancillary to the fund distribution. Paragraph 4(d) of the Stipulation bars fees for such tasks as well. *Dubose v. Harris*, 82 F.R.D. at 595.

Similarly, work to define the COC's structure and function is not compensable.

29. The court in *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir.1983) reasoned that, in a suit against the government involving "two or more independently dispositive claims," the plaintiff should collect fees under the EAJA only for work on those claims for which the government's defense was not substantially justified. However, the four motions described in the text dealt not with "independently dispositive claims" but with supplemental proceedings, all stemming from the single claim that HUD improperly suspended the section 236 operating subsidy program. It has been determined that HUD's defense to that single claim was not substantially justified. For plaintiffs to recover for work on these supplemental motions, it is sufficient that they prevailed.

Plaintiffs did not prevail on two post-settlement motions to hold HUD in contempt, and these motions are reasonably separable from the rest of the case. Accordingly, no fees could be awarded for work on these motions, even if such work were otherwise compensable. *See infra* p. __. *Cf. Hensley v. Eckerhart*, __U.S. __, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (in attorney fees case arising under 42 U.S.C. § 1988, where a plaintiff who is a "prevailing party" fails to prevail on claims unrelated to the claims on which he succeeded, attorney's fees may be reduced).

30. Although the *Hensley* case dealt with 42 U.S.C. § 1988, the Supreme Court noted "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " 103 S.Ct. at 1939 n. 7. 28 U.S.C. § 2412(d)(1)(A) provides for fee awards "to a prevailing party other than the United States." *See also* House Report 11, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4990 ("prevailing party" to be interpreted as in existing statutes).

31. In fact, this court indicated in an earlier opinion that this second claim was of quite doubtful validity. *See Dubose*, 405 F.Supp. at 1279 n. 10.

32. Mr. Sturdevant had graduated in 1972 from Boston College Law School, and had commenced employment in September of that year with TWLAP. Sturdevant Resume, Appendix 3 to Exhibit A to memorandum of law In Support of Motion of James C. Sturdevant for an Award of Attorneys' Fee (filed Sept. 27, 1982).

33. Paragraphs 23–27 of O'Brien's affidavit state:

23. I readily agreed to Mr. Sturdevant's offer to continue to handle *Dubose* after leaving CLS. I did so because:

a. Mr. Sturdevant had done an excellent job on the cases and could be expected to continue to do so;

b. The cases had become extremely complex procedurally or strategically and Mr. Sturdevant was the only Connecticut counsel who truly knew and understood all that there was to know about them at that time;

c. My new position as Housing Task Force Director as well as my many previously assumed and inalienable commitments presented me with more work than I could reasonably handle, even aside from *Dubose;*

d. It was my understanding that Mr. Sturdevant was leaving CLS to go to work for another legal services program, San Fernando Valley Neighborhood Legal Services (SFVNLS) of Pacoima, California;

e. My experience indicated that it is a very common practice for legal services lawyers "transferring" from one legal services program to another to bring especially complex, affirmative class action lawsuits along with them and continue to work on them after the "transfer."

f. It had become apparent that *Dubose* and the nationwide operating subsidy class action, *Underwood v. Pierce* (Civil Action No. 79–131–HP, C.D.Calif.) would in all likelihood be resolved on the same general terms; Mr. Sturdevant had been working together with counsel for the plaintiff class in *Underwood* for quite some time and it was certain that he would continue to do so to an even greater degree once he relocated to California.

24. When I agreed to permit Mr. Sturdevant to continue to serve as lead counsel for the plaintiffs in the *Dubose* cases for which CLS was responsible subsequent to April 30, 1978, I was somehow under the impression that he would begin his employment with SFVNLS *immediately* after his departure from CLS.

25. When I agreed to permit Mr. Sturdevant to continue to serve as lead counsel for the plaintiffs in the *Dubose* cases for which CLS was responsible subsequent to April 30, 1978, I had no idea whatsoever that Mr. Sturdevant would ever work on them in the capacity of a private attorney. The thought of any such contingency never occurred to me. All I knew was that Mr. Sturdevant was going to work for SFVNLS.

26. Had I known that Mr. Sturdevant was going to be working on *Dubose* as a private attorney and would later claim attorneys' fees in the cases for his own benefit for a period of time during which he was employed by SFVNLS, I would not have agreed to allow him to take the cases with him when he left CLS.

27. At no time prior to my intial awareness of Mr. Sturdevant's motions for attorneys' fees did I have any reason to believe that Mr.

Sturdevant was working on *Dubose* as a private attorney while in the employ of SFVNLS.

34. In paragraphs 6(a)–(f) of an affidavit filed as Exhibit A to the Memorandum of Law in Support of Motion of James C. Sturdevant for an Award of Attorneys' Fees (filed Sept. 27, 1982), Sturdevant summarizes his activities during this period as follows:

a. In May, 1978, I expended at least 26.25 hours doing research with other counsel representing plaintiffs in cases similar to *Dubose* concerning the concepts and issues to be included in the proposed settlement plan to be sent to officials at HUD and the Department of Justice. The tasks included research on the likelihood of HUD obtaining a supplemental appropriation from the Congress, the effect of the proposed settlement on tenants who resided in projects which had switched to individual tenant-metering for utilities, and those portions of the plan calling for provision of necessary information including project data and increases in taxes and utilities for each project by HUD to plaintiffs' counsel.

b. In June, 1978, I expended at least 11.25 hours in drafting correspondence to other counsel for plaintiffs, reviewing comments on our proposed settlement plan, reviewing a letter addressed to us and officials of HUD and the Department of Justice by counsel for a national organization of federally assisted housing owners and managers, and on meetings concerning the likelihood of obtaining a supplemental appropriation from HUD. I also spent several hours drafting comments on behalf of the *Dubose* class on regulations proposed by HUD for implementation of the revised operating subsidy program mandated by the 1977 Housing and Community Development Act.

c. In July, 1978, I expended at least 12.25 hours drafting letters to the eight major national accounting firms soliciting proposals to accomplish the nationwide distribution, reviewing proposals submitted by several of these accounting firms, and meeting with other counsel for plaintiffs to interview selected accounting firms.

d. In August, 1978, I expended at least 78.25 hours reviewing HUD's counter proposal for the settlement distribution and plaintiffs' counsel's reply to the proposal submitted to us and HUD by the National Organization of Housing Managers and Owners; reviewing assorted correspondence; reviewing the proposal to accomplish the settlement distribution submitted by Price Waterhouse & Co.; reviewing other accounting firm proposals; preparing for settlement negotiations; and attendance and full participation for several days of settlement negotiations with plaintiffs' counsel in *Dubose* and other settling cases, and officials of HUD and the Department of Justice in Washington, D.C.

e. During September, 1978, I spent at least 11 hours reviewing draft settlement documents and in telephone conferences with John Dziamba concerning suggested amendments to the draft settlement

agreement amendments to the draft settlement agreement proposed by HUD, and at the end of the month reviewing all correspondence received during the month from other counsel including officials from HUD and the Deparmtent of Justice.

f. During October, 1978, I expended at least 51.5 hours reviewing the final Settlement Agreement, drafting correspondence to my co-counsel in Connecticut and other counsel for plaintiffs in pending cases throughout the country, drafting a press release and appearing at a press conference in Los Angeles to announce the nationwide settlement, and drafting portions of the Stipulation for Settlement and the Motion to Amend Class Certification filed in November, 1978 in *Dubose*. In addition, I expended several hours included in the above total in researching a possible conflict of interest in my representation of the statewide classes certified in *Dubose* and in *Taylor v. Harris,* Civil No. H–78–86 (D.Conn.), and in telephoning and corresponding with potential successor counsel for the plaintiff statewide class certified in *Taylor*. [Only part of this paragraph pertains to Sturdevant's work during the period from May 1, 1978 through October 8, 1978.]

35. It should be noted that in the Stipulation for Settlement, dated September 26, 1978, Sturdevant signed as:

James C. Sturdevant
San Fernando Valley Neighborhood Legal Services.

By contrast, just below Sturdevant's signature, John Dziamba signed as:

John Dziamba
Attorneys, acting on behalf of the plaintiffs in *Dubose* and the other Connecticut cases . . . .

82 F.R.D. at 605.

36. These denials, credible in their own right, are bolstered by the determination *infra* that no such arrangement could have legally been made. Given the clear statutory prohibition of any compensated outside practice of law, it is most unlikely that the San Fernando and CLS attorneys would ever have agreed to Mr. Sturdevant's scheme.

37. Similarly, it should be noted that LSC asserts: no legal services attorney has ever before even remotely suggested that he or she is personally entitled to an award of fees for work done on behalf of a client who was eligible for Corporation-supported legal assitance. . . . Any private agreement or secret contract between a full-time legal services attorney and the program that employed such an attorney which purports to create such an entitlement would, in our view, violate the Legal Services Corporation Act and regulations, requirements that cannot simply be waived upon the agreement of individuals or entities subject to those provisions.

Amicus Curiae Memorandum of LSC, filed Dec. 9, 1982, at 3.

38. It should be noted that Sturdevant did not become a member of the California bar until 1980. Affidavit of Sturdevant (executed Dec. 29, 1982).

Vernice DUBOSE et al.

v.

Carla HILLS et al.

Claudia WALTER et al.

v.

Carla HILLS et al.

Janette LITTLE et al.

v.

Carla HILLS et al.

Civ. Nos. H–75–303, H–75–345, H–75–346.

United States District Court,

D. Connecticut.

Dec. 15, 1975.

Low-income residents of federally subsidized housing project sought declaratory and injunctive relief, compelling recission of a rent increase and implementation of the "opeating subsidy" program established in the Housing and Community Development Act of 1974. On the low-income resident's motion for preliminary injunction, the District Court, Blumenfeld, J., held that the Secretary of Housing and Urban Development was required to implement the "operating subsidy" program; and that the Secretary's refusal to implement the program constituted an unreasonable exercise of discretion, even if she would be required to use her contract authority to do so.

Preliminary injunction issued.

Dennis J. O'Brien, Norman K. Janes, Willimantic, Conn., for Dubose and others.

John A. Dziamba, Willimantic, Conn., James C. Sturdevant, Rockville, Conn., for Walter and others.

Joan Pilver, Hartford, Conn., Raymond Norko, Danielson, Conn., for Little and others.

Peter Dorsey, U. S. Atty., Marjorie A. Wilhelm, Asst. U. S. Atty., New Haven, Conn., Paul Michael, Civ. Div., Dept. of Justice, Washington, D. C., Rolland J. Castleman, Manchester, Conn., Guy DeFrances, Meriden, Conn., James H. Shulman, Hartford, Conn., for Hills and others.

RULING OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

BLUMENFELD, District Judge.

The plaintiffs in this action are low-income residents of a federally subsidized housing project, Windham Heights Apartments, in Windham, Connecticut. They complain that the federal[1] and private[2] defendants have denied them, and others similarly situated, rights protected by the fifth amendment, as well as rights created by the National Housing Act[3] as it was amended by the Housing and Community Development Act of 1974,[4] and regulations issued pursuant to that Act.[5] They seek declaratory and injunctive relief, compelling recission of a rent increase[6] and implementation of a presently dormant federal subsidy program.[7] Two similar suits were filed subsequent to the initiation of this action.[8] Temporary restraining orders have been issued in all three cases requiring that HUD pay a portion of the rent increases.[9] These motions for preliminary injunctive relief have been consolidated by agreement of the parties at the suggestion of the court. For purposes of these motions, the plaintiffs have decided not to proceed with their due process claims.[10]

I.

[1, 2] Jurisdiction is conferred by 28 U.S.C. § 1337. Several courts have held that the National Housing Act, having been enacted pursuant to Congress' commerce power, may be construed under the commerce jurisdiction.[11] I adopt their reasoning. Mandamus jurisdiction is also present, under 28 U.S.C. § 1361. Here, just as in *Langevin v. Chenango Court, Inc.*, [12] the plaintiffs seek an order compelling a hearing on the agency-approved rent increases.

Moreover, the plaintiffs seek to compel the Secretary to perform a duty she allegedly owes them—the payment of the subsidies authorized by the 1974 amendments to Section 236.[13] Since jurisdiction is properly founded upon Sections 1337 and 1361, I need not go through the calculations required to determine whether the housing subsidies sought by each of the plaintiffs here reaches the $10,000 jurisdictional amount required by 28 U.S.C. § 1331.[14] Nor need I discuss the availability of judicial review under 5 U.S.C. § 701 *et seq*. Declaratory and injunctive relief may be ordered pursuant to 28 U.S.C. §§ 2201 and 2202. These low-income tenants have standing to maintain this lawsuit, since they are clearly within the zone of interest created by Section 236 of the National Housing Act, and the threatened rent increases combined with the denial of the subsidy would harm them financially. As the requirements of Rule 23 are met here, class action treatment is appropriate in all three cases. The plaintiff classes certified consist of those family units now residing, or who may at some future time reside, at one of the three Section 236 housing projects involved in this lawsuit who pay or will pay more than 30% of their "adjusted family income" for rent as of the effective dates of the rent increases challenged here.[15]

II.

As the plaintiffs have decided not to pursue their constitutional claims at this time, the only issue before me involves the proper interpretation of Section 236 of the National Housing Act.[16] That section establishes a rental housing program, providing mortgage insurance and interest reduction payments on behalf of project owners who construct or rehabilitate housing "designed for occupancy by lower income families." Section 236 was amended in 1974, by the addition of a new "operating subsidy" program, the provisions of which are set forth in the margin,[17] as part of the Housing and Community Development Act of that year. This program was adopted in response to problems in the administration of Section 236, due in large measure to the sharp increases in operating costs which had taken place

at many Section 236 projects. The relevant portion of the Senate Report accompanying its version of the Act is also set forth in the margin.[18] The clear import of the program, as outlined in the Committee Report, was to insulate the low-income tenants from the burden of operating cost increases.

However, no assistance payments have been made under this program. Instead, the Secretary of Housing and Urban Development, claiming that she possesses "full discretion to determine whether the program should be implemented," has decided not to fund or implement the program in any way.[19] The plaintiffs contend that this decision contravenes the mandate of Congress, and constitutes an unlawful "impoundment" of funds by the Secretary.[20] They argue, first, that she possesses no such "absolute" discretion regarding the implementation of the "operating subsidy" program and, second, that she has abused whatever discretion she may possess.

The issues in this case are quite similar to those addressed by the Court of Appeals for the District of Columbia Circuit in *Commonwealth of Pennsylvania v. Lynn*.[21] Here, as there, the Secretary's claim of discretion not to implement the Section 236 program does not rest on a claim of executive power not to spend appropriated funds or use released contract authority for fiscal or other policy reasons "totally collateral" to the purpose of the Section 236 housing program.[22] Rther, the Secretary has refused to act on the basis of policy decisions she claims will better effectuate the underlying goals of the National Housing Act and, indeed, Section 236 itself. In *Lynn* the court held that the Secretary possessed a narrow discretion to terminate or suspend the entire Section 236 program,[23] and that the temporary suspension there at issue constituted a reasonable exercise of that discretion.[24] Here the question concerns the Secretary's decision not to implement certain newly enacted subsidy provisions of that same Section 236 program. At issue is the extent of her discretion, and the propriety of its exercise.

III.

[3] I turn first to the question of whether the Secretary possessed any discretion not to implement the "operating subsidy" program. The answer must be found by probing the intent of Congress in enacting the program.[25] The Secretary cites the language of the Act, its legislative history, and the subsequent funding actions of the Congress in support of her claim that the Congress never intended to compel her to implement this program. Her initial argument is that all three of these are couched in precatory rather than mandatory language; from this she concludes that the "operating subsidy" program was but one of several options open to her for use in implementing the overall objectives of the National Housing Act. Her second argument, based exclusively on the provisions for funding the program, is that she possesses discretion concerning how to allocate the contract authority Congress has released to her among the various federal housing programs for which that authority may be used, and hence is empowered to choose not to expend that authority on any particular program.

A. *The Language*

The Secretary begins her mandatory/precatory distinction by contrasting the language in two subsections of Section 236, (f)(2) and (3). The first of these established the "deep subsidy" program, and provides that "the Secretary shall make, and contract to make, additional assistance payments. . . ." This program has been implemented by the Secretary.[26] The "operating subsidy" program at issue in this case was established by (f)(3), which provides that "the Secretary is authorized to make, and contract to make, additional assistance payments. . . ." Both subsidies were added by the 1974 amendments to Section 236.[27] Focusing upon the use of "authorized" in (f)(3), the Secretary claims that Congress never intended to *compel* her to "make, and contract to make" the payments permitted by that subsection.

She makes essentially the same argument based on the legislative history of the Housing and Community Devel-

opment Act of 1974, emphasizing the phrases "would be authorized" and "may be used" in the Report of the Senate Banking, Housing, and Urban Affairs Committee.[28] Her claim is also based on the language of the Senate Appropriations Committee's Report[29] accompanying the Supplemental Appropriations Act[30] which specifically "authorizes" the Secretary to use her available contract authority to implement the "operating subsidy" program.

The Secretary's emphasis on "may" and "authorized" is misplaced. Despite the deference properly due to the interpretation given the statute by the agency charged with its enforcement,[31] I conclude that the overall thrust of this statute is not optional. In addition to those passages relied upon by the Secretary, subsection (f)(3) directs that "[f]or each project there shall be established an initial operating expense level" when the project is fully occupied. Furthermore, subsection (g) requires the establishment of that level, for Section 236 projects already under contract, "not later than 180 days after August 22, 1974," the date of enactment of the Act.[32] Subsection (g) also directs that the project owner "shall" pay excess rentals to the Secretary, which "shall" be credited to a reserve fund, for use in implementing the "operating subsidy" program established by (f)(3). Such excess rental charges "shall" be treated as appropriated funds, available to make these additional assistance payments, during any period that the Secretary has determined them sufficient to implement the program.

Of course, "tallying the 'shalls' and mays' " does not always provide insight into Congress' collective state of mind.[33] This is particularly true where, as here, the statute is a mixture of mandatory and precatory clauses. The Secretary asserts that she is not even required to make a determination of the initial operating expense levels, despite the statute's apparently mandatory language and explicit compliance deadline. The Secretary is wrong about that. The mandatory language of this clause, the inclusion of the compliance deadline for existing projects, and the adoption of the program in response to a specific need, convince me that Congress intended that the Secretary implement this program, and do so quickly. I interpret the "authorization" language as indicating only that the Secretary need not

make, or contract to make, these additional assistance payments in any set amounts, or for every single Section 236 project.[34] Congress was concerned about this problem, but wanted to handle it without rewarding those projects where poor management was responsible for the cost increases.[35] Accordingly, it adopted a program which permitted the Secretary to assist deserving projects only; hence the use of "authorized" rather than "shall" in the statute. Under this reading of Section 1715z–1, the Secretary was mandated to establish "an initial operating expense level" for the three projects involved in this suit. The temporary restraining orders issued in these cases directed that she do so immediately, and those levels have now been established.[36]

B. *The Funding Arrangements*

The Secretary also contends that, even if she must take the first steps toward implementing the "operating subsidy" program, the funding actions of Congress demonstrate that she has discretion over whether or not to fund the program. Of course, this is simply another way of claiming that she has complete discretion concerning whether to implement the program at all. Her argument rests upon the general nature of her spending authority under the federal housing programs, the specific provisions of this statute, and the actions of the Congress subsequent to the passage of the Housing and Community Development Act of 1974.

The federal housing programs are funded through a combination of Congressional actions. First, Congress must authorize the appropriation of funds for a program; this is done by subsection (i) of Section 236,[37] which provides:

> "There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section. . . ."

Subsection (i) further provides that:

> "The aggregate amount of outstanding contracts to make such payments shall not exceed amounts approved in appropriation Acts, and payments pursuant to such contracts shall not exceed. . . ."

This demonstrates the other steps in the normal funding

process: Congress must release contract authority to the Secretary, and it must also appropriate funds to make payments under these contracts. These latter two steps must be done in Appropriations Acts, separate and distinct from the authorizing statute. The Secretary notes that Congress has not released any new contract authority for use in implementing the "operating subsidy" program, nor has it appropriated funds specifically for that purpose. Thus, she claims, the implementation of the program must come out of funds and contract authority generally available for use in the Section 236 program, funds over which she claims to have broad discretionary power.

Her argument runs as follows. First, she contends that the original Act does not compel her to spend the moneys in the reserve fund, since the Legislative history merely provides that they "may be used" to make these additional assistance payments. Second, she argues that she has no power to expend these moneys except pursuant to contract, because payments are to be made as provided in (f)(3). Thus, she cannot implement the program unless she has contract authority available. Since no new contract authority has been released, she has to use contract authority which she had prior to the establishment of the "operating subsidy" program. She admits that the legislative history to the Supplemental Appropriations Act[38] clarified Congress' intent with respect to funding the "operating subsidy" program, specifically authorizing the Secretary to use her "available contract authority for operating subsidies for existing or new 236 projects."[39] However, she again raises the mandatory/precatory argument, since the committee report merely "authorizes" her to so use that authority. Furthermore, she contends that this language must be considered in conjunction with the Congress' explicit direction in that same report that the Secretary "utilize available resources for the Section 236 program at the earliest date to meet the need for lower income housing."[40] This second directive, she asserts, meant that she was to use her available contract authority to increase housing production,[41] and that, when read together, these two directives give her discretion over

how to allocate her contract authority among a number of federal housing subsidy programs in order to best respond to the need for lower income housing.

There are two responses to this argument. The first involves the relationship between the reserve fund and the exercise of contract authority. The second involves the scope and exercise of the Secretary's discretion with respect to the use of her admittedly available contract authority. Only the first is properly considered at this time, since it involves the mandatory nature of the "operating subsidy" program. The second concerns the exercise of the Secretry's discretion, and will be considered in Part IV of this opinion.

The problem with the Secretary's arguments concerning the availability of the reserve fund is her initial premise. Were she authorized to "make" these additional assistance payments without a "contract to make" them, the program could operate independently of her available contract authority. I hold that she is so authorized.

The statute authorizes her to "*make,* and contract to make," (emphasis added) these payments. It also provides a source of funds from which she is to "make" these payments—the reserve fund discussed in subsection (g). That subsection directs that excess rental charges be paid to the Secretary, and credited to the reserve fund. These moneys are "to be used by the Secretary" to make the additional assistance payments. Whenever she "determines that the balance in the reserve fund is adequate," she is to credit the excess charges to the appropriation authorized in subsection (i). These moneys "shall be available" until the end of Fiscal Year 1976, for implementing the "operating subsidy" program. As provided in subsection (f)(3), the payments may only be made after the Secretary determines that the operating cost increases sought to be subsidized are "reasonable" and "comparable" to those occurring throughout that community.

Congress thus established, in subsection (g), a special method for funding the "operating subsidy" program, under

which the excess rental payments would automatically be ploughed back into the Section 236 program. When the Section 236 program was first established,[42] the reserve fund was to be used to make interest reduction payments, "subject to limits approved in appropriation Acts pursuant to subsection (i)" of 12 U.S.C. 1715z-1.[43] The Housing and Community Development Act of 1974 changed both the purpose for which, and means by which, the reserve fund was to be spent. It directed that the fund henceforth go to the "operating subsidy" program, rather than for interest reduction payments, the Senate Report noting that the Committee considered this a "more appropriate" use of the fund.[44] Furthermore, as noted above, the fund would now be appropriate automatically, and hence available for distribution, once the Secretary determined its balance to be sufficient to implement the "operating subsidy" program. This new procedure meant that Congress would not have to approve appropriations to the fund, provided the amounts involved remained within the authorization ceiling set forth in subsection (i). In this respect this funding method is similar to the contract-authority and allotment scheme considered in *Train v. City of New York*.[45] Under this view of the statute, direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority.[46] Of course, the Secretary may choose to fund the program by using her available contract authority, as is also provided in subsection (f)(3). Congress explicitly authorized this alternative funding method later in 1974.[47]

The issue here thus becomes, as it was in *Train v. City of New York*,[48] whether the Secretary has the authority not to spend the reserve fund to implement the "operating subsidy" program. All the language concerning the reserve fund is mandatory, except that making the Secretary responsible for determining whether the balance is adequate to fund the program. Furthermore, the Act contains a strict compliance deadline, directing the Secretary to establish initial operating expense levels for existing Section 236 projects within 180 days.

The Secretary argues, however, that the legislative history supports her contention that the reserve fund need not be so used. She once again points to the phrase "may be used" in the Senate Report discussing the new program and the attendant changes in the use of the reserve fund.[49] However, here the language of the statute is clearly mandatory, and the presence of a possibly qualifying phrase in the legislative history cannot undercut that interpretation.[50]

More important, the legislative history does not support the Secretary's position. The Senate Committee's phrase "may be used" must not be isolated from its legislative context. The Congressional hearings[51] which led up to the Housing and Community Development Act of 1974 demonstrated that rising operating costs were endangering the viability of many Section 236 housing projects. These increased costs were passed on to the tenants, many of whom were forced to choose between spending far in excess of one-quarter of their incomes on shelter or leaving the housing project. And, as the Court of Appeals noted in *Commonwealth of Pennsylvania v. Lynn,* the project owners had a "strong interest" in attracting tenants with large incomes, rather than low-income tenants for whom the program was designed,[52] since:

> "all tenants must pay at least the 'basic rent,' *i. e.,* their share of operating expenses plus amortization at an assumed one per cent, by themselves, tenants with a larger income are better able to absorb increases in the basic rent, which increases as operating expenses rise."

501 F.2d at 865–66. Thus, as enacted, the "operating subsidy" program was designed to insulate the tenants from these cost increases, to protect the project owners from vacancies and collection losses, and to preserve the low-income character of the Section 236 housing projects.[53] My review of this legislative history merely strengthens my conclusion that the Congress did not give the Secretary any discretion—full and absolute or otherwise—not to use the reserve fund to implement the "operating subsidy" program. The statute is mandatory, and the Secretary's refusal to implement the program is contrary to law.

IV.

If, however, the Secretary is correct in her contention that payments from the reserve fund can only be made pursuant to contracts, then those disbursements are subject to the Secretary's allocation of her contract authority. Accordingly, I turn now to her claim that she possesses discretion concerning the allocation of her contract authority, and that she has properly exercised it in deciding not to fund the "operating subsidy" program.

[4] I do not disagree with her basic contention, that she has discretion over how to allocate her contract authority among the various federal programs providing assistance to housing for which it might be used. Congress certainly vested her with this discretion by releasing such contract authority to her without specifying what programs were to be funded, or at what levels. Thus, it is unimportant whether or not there is a real conflict, as she claims, between her authority to implement the "operating subsidy" program and Congress' directive that she act to "meet the need for lower income housing."[54] The discretion to choose how to reconcile those objectives is necessarily vested in her office.

My task, therefore, is to evaluate how she has exercised this discretion. The decision not to fund, or implement in any fashion, the "operating subsidy" program is analogous to the decision by one of her predecessors to suspend the Sections 235, 236, and 101 programs.[55] Here, as there, the discretion not to implement a Congressionally authorized and funded program is, at best, quite narrow.[56] Accordingly, I shall test her actions by the reasonableness standard applied in *Commonwealth of Pennsylvania v. Lynn*.[57] The question becomes whether it was reasonable for the Secretary not to implement the "operating subsidy" program, considering (as she claims to have done) the purposes and policies behind Congress' enactment of that program, the objectives of Section 236 and the National Housing Act, and the expected consequences of her decision.

[5] My pursuit of this inquiry is assisted greatly by the Congressional response to the earlier decision to suspend (or terminate) the Sections 235 and 236 programs. The Senate Reports[58] which accompanied the 1974 HUD Appropriations Act[59] stated that the Appropriations Committee

> "is distressed and deeply concerned by the Administration's action to abandon our nation's historic housing program. . . . In January 1973 the Administration froze virtually all new starts for low and moderate income families. Some 17 housing programs or programs closely associated with housing were stopped. . . . The Committee feels that the Administration has justified its actions for a variety of unsupported reasons. Among other things, it has claimed that the programs were not achieving the goals set by Congress, but by no stretch of the imagination is that correct."[60]

That same Committee responded equally strongly to the decision in *Commonwealth of Pennsylvania v. Lynn* which upheld the legality of the suspensions discussed in the preceding paragraph. The Court in *Commonwealth of Pennsylvania v. Lynn* found as a fact that there were inherent structural problems with the Section 235 program, problems sufficient to justify the then-HUD Secretary's decision to suspend that program.[61] The Court also found it "sufficiently plausible" that similar defects were inherent in the Section 236 program, and therefore it upheld the Secretary's conclusion that it was also impossible to administer that program consistently with Congressional intent.[62] However, the Congress apparently disagreed with these conclusions, for it extended the life of the Sections 235 and 236 programs for two years, until the end of Fiscal Year 1976, when it adopted the Housing and Community Development Act of 1974.[63] Indeed, the Senate Report which accompanied the subsequent HUD Appropriations Act took issue with "some judicial mistakes of fact," stating explicitly that:

> "The Sections 235 and 236 programs suffered from both HUD mismanagement, and actual corruption, rather than from any inherent defects in the programs. In

> cities with good HUD management, such as Milwaukee, the program was a great success. In cities with rampant corruption among housing officials, it, along with other HUD programs, failed. But the failures in certain cities were not peculiar to Sections 235 and 236 and, in fact, these programs were not the main ones affected or which failed, contrary to the opinion of the Department and some judicial mistakes of fact. The Department blamed the programs instead of its own mismanagement. As a consequence of this mismanagement, over 400 indictments have been handed down in housing fraud cases.
>
> . . . More than two-thirds of those receiving assistance receive lower subsidies each because their incomes are rising, which was a major aim of the program. Some 50,000 Section 235 homebuyers have gone off subsidy altogether and, in the Committee's opinion, these are distinct measures of program success."[64]

I consider myself bound by these expressions of Congress' confidence in these programs. The wisdom or effectiveness of the entire Section 236 program is not in issue in this case, but these statements by the Committee are relevant to an evaluation of the Secretary's decision not to implement the "operating subsidy" provisions of the Section 236 program.

The Secretary refuses to implement the "operating subsidy" program because she claims it is "inequitable." She points to what HUD perceives as a

> "Need for a general multifamily default policy which will address itself to the economic difficulties facing owners and tenants of all HUD assisted multifamily projects."[65]

She then contrasts this need with the limitations in the groups served and relief afforded by the "operating subsidy" program, and concludes that the public interest is better served by not funding such a limited and discriminatory program.

The Congress, however, has specifically indicated its disagreement with precisely this sort of "all or nothing" analysis. The same Senate Report quoted above rejected a similar HUD argument in favor of the suspension decision, "that if not everyone could be subsidized under the program, no one should be subsidized."[66] The Committee urged the Secretary to implement the programs "concurrently" with the new Section 236 program, characterizing the "all or nothing" decision to halt the older programs as one based on "policy distaste," not "factual evidence." In response to that policy decision, as noted above, the Congress extended the life of the Sections 235 and 236 programs.

The same considerations apply to the "operating subsidy" program at issue here. It was added to Section 236 in 1974, for projects assisted under Section 236, as part of Congress' effort to improve the Section 236 program when it was reenacted. Congress adopted the "operating subsidy" provisions in response to the serious problem of operating cost increases due to sharp rises in oil prices and local property taxes.[67] The program was designed to assist only "deserving" projects, and their low income residents. HUD cannot now refuse to fund or implement the "operating subsidy" provisions because they only solve the particular problem for which they were designed, or because they only help the particular population for which they were enacted. The "operating subsidy" program does not have a counterproductive impact on our national housing effort merely because it does not solve all the present problems facing HUD's multifamily assistance programs. Surely Congress has the power to solve a specific problem with which it is familiar without running the risk of administrative nonenforcement because it has not gone far enough, or not gone in the direction considered desirable by the executive branch. I find that Congress enacted the "operating subsidy" program in an effort to help those well-managed Section 236 housing projects which had been the victims of skyrocketing tax and utility bills, and the low income tenants residing in those projects.

The legislative history of the funding process strengthens my conclusion that the Congress intended that this program be implemented, using the Secretary's available contract authority if necessary. As the Secretary notes in her brief, Congress initially forbade her from using her then-available contract authority to implement the "operating subsidy" program.[68] However later that year, in a "clarification" of the earlier Conference Report, the Secretary was specifically "authorized" to use her available contract authority to implement the program.[69] Furthermore, she was directed to consider this authority in evaluating the feasibility of proposed Section 236 projects.[70] Of course, Congress could have spoken more bluntly. It might have mandated that the Secretary use her contract authority, and use it to fund the "operating subsidy" program. Indeed, the Secretary now argues that Congress' failure to do just that, in the face of her adamant refusal to fund the program, constitutes acquiescence with her decision. But Congress cannot be required to legislate two or three or more times before the executive must act. Where it has once spoken clearly, the duty to execute the law arises.[71]

I conclude that Congress has spoken clearly here. It extended the life of the Section 236 program, in spite of executive branch criticism and opposition.[72] It rejected that criticism, which alleged that the program was unworkable and could not help everyone. It amended the program, to solve some of what it saw as the real problems which had developed. It set up a special funding method for the "operating subsidy" provisions of the program. It specifically permitted the use of contract authority as an alternate way to fund the new "operating subsidy" provisions. The Secretary's claimed rationale for refusing to fund the program with her contract authority—its inequitable coverage—misses the point of Congress' actions entirely and does not constitute a valid exercise of discretion. Thus, her decision not to implement the program in the face of these strong manifestations of Congressional sentiment is unreasonable. I hold that even if the use of contract authority were necessary to use the moneys in the reserve fund to implement

the "operating subsidy" program, her refusal to do so in these cases constitutes an unreasonable exercise of her discretion.

[6] The standards governing the issuance of preliminary injunctive relief are well-established in this circuit. The party seeking the injunction must combine a clear showing of probable success on the merits with the possibility of irreparable injury, or else raise substantial questions involving the merits, while demonstrating that the balance of hardships tips sharply in his/her favor.[73]

[7] As the foregoing discussion demonstrates, I am of the opinion that the plaintiffs will almost surely succeed in obtaining permanent injunctive relief at the trial on the merits. The nature of the relief they seek, federal subsidies enabling them to continue in low-cost housing, and the nature of the harm they face if such relief is denied[74] persuade me that they will suffer irreparable injury if the Secretary is not ordered to continue payment of the "operating subsidy" pending my final ruling. HUD is not paying the full amount of any of these rent increases, but only that portion attributable to increases in local property taxes and utilities. In all three cases, however, this is a substantial portion of the total increase. In *Walter* it comprises 98% of the increase, in *Little* 23%,[75] and in *Dubose* nearly 100%. This constitutes a sufficient showing of irreparable injury to warrant the issuance of preliminary injunctive relief.[76]

VI.

I have concluded that the plaintiffs are entitled to the preliminary injunctive relief they seek. Pursuant to my earlier orders, the operating levels for these three projects have already been determined. All that remains to set the program in motion is a determination by the Secretary that the balance in the fund is adequate to implement the "operating subsidy" program. The affidavits which have been submitted by the Secretary indicate that there is enough money in the reserve fund to finance the program for the

remainder of this fiscal year. As of October 31, 1975 the balance in the fund was $40,647,789.[77] The Department estimates tht full implementation of the "operating subsidy" program would require approximately $4.3 million per month,[78] or less than $30 million for the remainder of Fiscal Year 1976—the last year for which this use of the reserve fund is presently authorized.[79] The determination required here is merely a ministerial act, which may be ordered by me despite the Secretary's prior refusal to perform it.[80] Therefore, I order the Secretary to determine whether "the balance in the reserve fund is adequate to meet the estimated additional assistance payments" due until the end of this fiscal year.

Once that determination is made, the only apparent obstacle to continued payment of the subsidy to these three projects is the requirement that the cost increases they have suffered be found to be "reasonable" and "comparable" to those affecting similar rental projects.[81] In view of the fact that HUD has itself approved the rent increases which began this litigation,[82] based at least in part upon these figures, that requirement should not present any problem. I therefore order the Secretary to make the required finding, if proper.

Finally, once the Secretary is ready to implement the "operating subsidy" program by making these determinations, I order her to make the additional assistance payments on behalf of all tenants at these three projects who qualify according to the language set forth in 12 U.S.C. § 1715z-1 (f)(3), *i. e.*, the classes previously certified. In view of the fact that these determinations should have been made by the Secretary long ago, I order that she continue to pay the operating subsidies, as directed by the temporary restraining orders previously issued, until further order of this court.

This injunction may be modified on motion of any party, for good cause shown.

It is so ordered.

ENDNOTES

1. The Secretary of Housing and Urban Development, Carla Hills, is sued individually and in her official capacity.

2. The owner of the housing project, Windham Heights Associates, is a limited partnership. The managing agent, Anthony Associates, is a general partnership. Simon Konover is a general partner in both partnerships. All three are named defendants.

3. 12 U.S.C. § 1701 *et seq.* (1970).

4. Pub.L. 93–383, 88 Stat. 633 (1974).

5. 24 C.F.R. §§ 236.1 *et seq.;* §§ 401.1 *et seq.;* and §§ 425.1 *et seq.*

6. The Department of Housing and Urban Development (HUD) approved a $20 per unit rent increase during the summer of 1975, to take effect October 1, 1975.

7. The Housing and Community Development Act of 1974, Pub.L. 93–383, 88 Stat. 633, added a new subsidy program to Section 236, providing for the payment of operating subsidies to certain housing projects assisted under Section 236, 12 U.S.C. § 1715z–1. (Supp. IV, 1974). Section 212 of the Act contained the new program, which now may be found at 12 U.S.C. §§ 1715z–1(f)(3) and (g). (Supp. IV, 1974).

8. *Walter v. Hills,* Civil No. H–75–345 and *Little v. Hills,* Civil No. H–75–346. These cases involve different housing projects, with different plaintiffs private defendants. Although some of the issues are also different, the primary claim in each of these cases is the same as the federal statutory claim at issue here.

9. HUD is paying, as required, "that portion of the approved rent increase which is directly attributable to an increase in taxes and utilities paid by the private defendant" in all three cases. These payments are "for the account of those tenants who are currently spending more than 30% of their adjusted family income toward rent."

10. They have reserved their right to challenge the rent increases at the trial on the merits. *But see Harlib v. Lynn,* 511 F.2d 51 (7th Cir. 1975); *Langevin v. Chenango Court Inc.,* 447 F.2d 296 (2d Cir. 1971); and *Hahn v. Gottlieb,* 430 F.2d 1243 (1st Cir. 1970).

11. *Davis v. Romney,* 490 F.2d 1360, 1365–66 (3d Cir. 1974); *Bloodworth v. Oxford Village Townhouses, Inc.,* 377 F.Supp. 709, 714–15 (N.D.Ga.1974); *Mandina v. Lynn,* 357 F.Supp. 269, 276 (W.D.Mo.1973). *Cf. Winningham v. United States Department of Housing & Urban Development,* 512 F.2d 617, 621–23 (5th Cir. 1975). *But cf.* the perfunctory rejection of a similar claim that the United States Housing Act of 1937, 42 U.S.C. § 1401 *et seq.,* could be construed under the commerce jurisdiction in *Potrero Hill Community Action Committee v. Housing Authority of the City and County of San Francisco,* 410 F.2d 974, 978–79 (9th Cir. 1969).

12. 447 F.2d 296, 300 (2d Cir. 1971).

13. *See Kahane v. Carlson,* 527 F.2d 492 (2d Cir. 1975) (Friendly, J. concurring) for a brief discussion of the nature of mandamus jurisdiction, and its relationship to the general federal question jurisdiction in suits against federal officers. *Winningham v. United States Department of Housing & Urban Development,* 512 F.2d 617, 620–21 (5th Cir. 1975) is not contrary. There the plaintiff sought mandamus to compel the defendants to "ignore their statutory mandate" in favor of her asserted constitutional right. Here, by contrast, the plaintiffs merely seek to enforce an alleged statutory duty, under Section 236.

14. *See Winningham v. United States Department of Housing & Urban Development,* 512 F.2d 617, 620 n.6 (5th Cir. 1975); *Joy v. Daniels,* 479 F.2d 1236, 1239 n.6 (4th Cir. 1973); *Bloodworth v. Oxford Village Townhouses, Inc.,* 377 F.Supp. 709, 714 (N.D.Ga. 1974); *Anderson v. Denny,* 365 F.Supp. 1254, 1259 (W.D.Va.1973).

15. The plaintiffs in *Little* also challenge the method by which HUD has calculated the operating subsidy, alleging that more residents of East Hartford Estates should be covered and that higher payments should be made. They base this claim on the special provisions for separate metering of utilities in (f)(1)(i) and (ii), and (f)(3) of Section 236. Because this claim has not been briefed or argued by either party, I do not decide it today. The plaintiffs may, of course, raise it at the hearing on the merits.

16. Now found at 12 U.S.C. § 1715z–1 (Supp. IV, 1974).

17. Section 212 of the Act recast and amended, among other provisions, subsections (f) and (g) of Section 236. The "operating subsidy" program at issue here is contained in subsections (f)(3) and (g), and provides that:

> "(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

"(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistanee payments, such excess charges shall be credited to the appropriation authorized by subsection (ĩ) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974."

18. "The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments. While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.

"Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, maintenance,* and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A), the amount by which the sum of the cost of utilities, maintenance, and local property taxes exceeds the initial operating expense level, or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community."

S.Rep. No. 693, 93d Cong., 2d Sess. (1974), reported at 3 U.S.Code Cong. & Admin.News, pp. 4303–04 (1974).

*The provision for subsidizing increases attributable to maintenance was deleted from the bill before its enactment into law.

19. The Secretary has the authority, under subsection (h) of Section 236, "to make such rules and regulations, to enter into such agreements, and to adopt such procedures as are deemed necessary or desirable to implement the Section 236 program. None of this authority has been exercised with respect to the operating subsidy" provisions.

20. Neither they nor the Secretary contend that the provisions of the Congressional Budget and Impoundment Control Act of 1974, Pub.L. 93–344, 88 Stat. 297, 31 U.S.C. § 1401 *et seq.* (Supp. IV, 1974) apply to this case. The President has not included the moneys in the reserve fund established by subsection (g) among the deferrals of budget authority required to be reported to Congress by that Act. Nor has the Comptroller-General. The Congressional debates are unclear as to whether the Secretary's contract authority which was released prior to the passage of the Impoundment Control Act is governed by its provisions. The Senate sponsor, Senator Sparkman, stated his belief that the funds already impounded would be subject to that Act, in response to a question from Senator Humphrey. 120 Cong.Rec. S14,896 (daily ed. Aug. 13, 1974). In the House of Representatives, however, Representative Brown of Michigan indicated that it was his understanding that that Act would not apply to previously appropriated funds. 120 Cong.Rec. H8433 (daily ed. Aug. 15, 1974). The Senate version of the Housing and Community Development Act had contained a provision, Section 821, purporting to require the President and the Secretary to fully fund the programs under the Act. This provision was deleted from the Housing and Community Development Act prior to its adoption, perhaps because of the intervening passage of the Impoundment Control Act. The Impoundment Control Act was adopted with a disclaimer provision, Section 1001 of Pub.L. 93–344. That clause stated that:

> "Nothing contained in this Act . . . shall be construed as . . . (4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

Because I construe § 1715z–1(g) as requiring the Secretary to spend the moneys in the reserve fund, *see* Part III B, *infra*, at 1284–1288, this disclaimer clause indicates that the Impoundment Control Act is inapplicable here.

21. 163 U.S.App.D.C. 288, 501 F.2d 848 (1974). Two district courts have decided practically identical cases and reached the same results as do I. *Harrison v. Hills,* Civil No. 75–938 (W.D.Pa. Oct. 1, 1975); *Ross v. Community Services, Inc.,* 396 F.Supp. 278 (D.Md.1975).

22. *See Commonwealth of Pennsylvania v. Lynn,* 163 U.S.App.D.C. 288, 501 F.2d 848, 852 (1974) and cases cited therein.

23. 501 F.2d at 861.

24. 501 F.2d at 865, 867.

25. 501 F.2d at 852, citing *Minor v. Mechanics' Bank,* 26 U.S. (1 Pet.) 46, 64, 7 L.Ed. 47 (1828).

26. Brief of Defendant Carla Hills at 10.

27. Section 212 of Pub.L. 93–383, 88 Stat. 633 (1974).

28. S.Rep. No. 693, 93d Cong., 2d Sess. (1974).

29. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974).

30. Pub.L. 93–554, 88 Stat. 1771 (1974).

31. *See, e. g., Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

32. The Secretary's predecessor apparently interpreted the virtually identical language of 42 U.S.C. § 1437g as being mandatory. That section directs that:

> "the Secretary shall establish standards for costs of operation and reasonable projections of income, taking into account the character and location of the project and characteristics of the families served, or the costs of providing comparable services as determined in accordance with criteria or a formula representing the operations of a prototype well-managed project."

These operating cost levels are to be established so that the Secretary:

> "may make annual contributions to public housing agencies for the operation of low-income housing projects."

These provisions were enacted as the new "Section 9" program, by Section 201(a) of the same Housing and Community Development Act of 1974 which established the Section 236 "operating subsidy" program at issue in this case.

The language establishing these two programs is quite similar, both authorizing the Secretary to pay operating cost subsidies to projects serving low-income tenants and mandating the setting of operating cost levels. However, HUD has treated the two programs quite differently, acting rapidly to implement the Section 9 program while leaving the Section 236 program dormant. An Interim Rule was published in the Federal Register of April 16, 1975, implementing the Section 9 program for operating cost subsidies to public housing agencies retroactively to April 1, 1975. 24 C.F.R. §§ 890.101 *et seq.,* 40 Fed.Reg. 17008–15 (1975). Yet nothing has been done to implement the Section 236 except pursuant to court orders. And this inaction has occurred despite Congress' setting an explicit compliance deadline of 180 days for the Section 236 program, while permitting 18 months for the implementation of the Section 9 program. *Compare* Section 201(b) of Pub.L. 93–383 *with* subsection (g) of section 236, establishing the effective date of the Act.

33. *Commonwealth of Pennsylvania v. Lynn,* 163 U.S.App.D.C. 288, 501 F.2d 848, 854 (1974).

34. The *"Joint Explanatory Statement of the Committee of Conference"* on Pub.L. 93–383, Conf.Rep. No. 1279, 93d Cong., 2d Sess. (1974), states that:

> "The conferees wish to point out that the specific amount of such increased subsidies should be determined by the Secretary taking into account the need to encourage reasonable economies in the operation of projects."

35. *See* S.Rep. No. 693, quoted at note 18 *supra.*

36. HUD determined these levels, and has been paying the subsidy calculated on that basis on behalf of tenants at all three projects, as set forth in note 9 *supra*. As discussed in note 15 *supra*, the plaintiffs in *Little* challenge the calculations used.

37. 12 U.S.C. § 1715z–1(i) (Supp. IV, 1974).

38. Pub.L. 93–554, 88 Stat. 1771 (1974).

39. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974).

40. *Id.*

41. The interest reduction payment and mortgage guarantee programs are commonly known as the "production subsidy," since they were enacted to encourage the construction and rehabilitation of low income housing. The Secretary contrasts the impact of these programs with the "operating subsidy" at issue in this case, which she claims will not encourage the bringing of new units into the market. Although I need not resolve the conflict she asserts exists between these two instructions, *see infra* at 1288, I note that the Senate appeared to believe the "operating subsidy" to be relevant to housing production when it urged the Secretary to consider her authority to pay it in her evaluations of proposed Section 236 projects. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). I also note that the "operating subsidy" program may help "meet the need for lower income housing" to which the Senate and the Secretary referred, by keeping Section 236 projects out of default and by keeping their basic rentals down for their low income tenants.

42. In 1968, by the Housing and Urban Development Act of that year, Pub.L. 90–448, 82 Stat. 498 (1968).

43. This was the original language of 12 U.S.C. § 1715z–1(g), as enacted in 1968.

44. S.Rep. No. 693, 93d Cong., 2d Sess. (1974). This portion of the report states:

> "Under the current law, where tenants in a project are able to pay more than the basic rent the excess is returned to the Federal Government and may be used for the production subsidy now authorized. The Committee feels that it would be more appropriate if the 'excess' funds derived from project operations were made available for the making of the additional assistance payments to offset operating costs. Accordingly, the bill provides that such excess rentals shall be credited to a fund which may be used by the Secretary for making the additional payments based on initial operating expense ratios, as described above. This provision would also be applied to projects in the current section 236 program. For these existing projects, it is expected that the Secretary would establish the 'initial' ratios as of a date not later than 180 days after enactment of the bill."

45. 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975). *See* particularly the discussion at 420 U.S. 38, n.2, 95 S.Ct. 839.

46. Reference to the operating subsidy program adopted in 1974 for public housing agencies, discussed in note 32 *supra*, may prove helpful here as well. 42 U.S.C. § 1437g provides that:

"The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment subject to the availability of funds."

Congress there required that the payment of operating cost subsidies be made pursuant to a contract. Its failure to include a similar *requirement* in subsections (f)(3) and (g) lends further support to my interpretation of the funding method it set up here.

47. In the Supplemental Appropriations Act, Pub.L. 93–554, 88 Stat. 1771 (1974).

48. 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

49. S.Rep. No. 693, 93d Cong., 2d Sess. (1974).

50. Subsection (g) is set forth in full at note 15 *supra*. *See generally Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962). *See also Train v. City of New York*, 420 U.S. 35, 44–46, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

51. *See generally* "Hearings on Oversight on Housing and Urban Development Programs, Washington, D. C." Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., pts. 1 and 2 (1973). As Phillip N. Brownstein, Esq., a former HUD Assistant Secretary, testified on April 16, 1973:

"A continuing problem in the 236 program has been the under estimation of operating costs. Projects have been approved with unreasonably low cost figures and later as costs begin to mount rents have to be increased to levels that make the units too expensive for the income group contemplated." *Id.*, pt. 1, at 408.

Also helpful are the "Oversight Hearings" held at Chicago, Illinois earlier in 1973 and the Hearings on the Administration's 1973 Housing Proposals Before the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. (1973). These latter hearings covered S.2490, S.2507, and S.2508.

52. HUD now favors lifting income ceilings for Section 236 projects, as its "solution" to the sharp increases in operating costs. *See* 24 C.F.R. 236.72, 40 Fed.Reg. 52844–45 (1975).

53. *See* S.Rep. No. 693, 93d Cong., 2d Sess. (1974) reported at 3 U.S.Code Cong. & Admin.News 4302 (1974). The Report provides:

"Section 502 of the bill authorizes a new program of rent subsidies for lower income families.

"This program appears as section 502 of the proposed Act and grows out of the existing rental housing housing assistance program (section 236 of the National Housing Act). However, while it retains features of existing law, it also contains numerous improvements in that law so as to be, in many ways, a new program rather than a simple continuation of the old. It is believed that these changes—including provisions to promote a mix of families with more widely varying income levels and to prevent excessive rent increases and assist sponsors in meeting increases in operating costs beyond their

control—will help eliminate a variety of problems and permit the program to operate more effectively in the future. . . ."

Section 502 of the bill became Section 212 of the Housing and Community Development Act of 1974.

54. *See* note 41 *supra*.

55. Secretary Romney suspended these programs on January 8, 1973.

56. *Commonwealth of Pennsylvania v. Lynn*, 163 U.S.App.D.C. 288, 501 F.2d 848, 862 (1974).

57. *Id.*

58. S.Rep. No. 1056, 93d Cong., 2d Sess. (1974) and S.Rep. No. 1091, 93d Cong., 2d Sess. (1974).

59. Pub.L. 93–414, 88 Stat. 1095 (1974).

60. S.Rep. No. 1091, 93d Cong., 2d Sess. 6 (1974).

61. *Commonwealth of Pennsylvania v. Lynn*, 163 U.S.App.D.C. 288, 501 F.2d 848, 865 (1974).

62. 501 F.2d at 867.

63. Pub.L. 93–383, 88 Stat. 633.

64. S.Rep. No. 1091, 93d Cong., 2d Sess. 6–7 (1974).

65. Affidavit of H. R. Crawford, Assistant Secretary for Housing Management of the Department of Housing and Urban Development, at 2 (October 15, 1975).

66. S.Rep. No. 1091, 93d Cong., 2d Sess. 7 (1974).

67. 120 Cong.Rec. S14896 (daily ed. Aug. 13, 1974), remarks of Senator Humphrey.

68. Conf.Rep. H.R. No. 1310, 93d Cong., 2d Sess. 6 (1974). The report's pertinent provision reads:

> "The conferees are also agreed that the provisions relating to operating costs subsidies in the new section 236 program authorized by the Housing and Community Development Act of 1974 shall not apply to the unused balance of outstanding contract authority that may be committed for new projects pursuant to this act."

69. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). This report reads:

> "The Committee wishes to clarify the intent of the joint explanatory statement of the Committee of Conference on H.R. 15572 with respect to the use of operating cost subsidies for Section 236 projects that the Secretary is authorized to use available contract authority for operating subsidies for existing or new 236 projects."

This change was agreed to by the Conference Committee:

> "The conferees are agreed as to the clarifying intent of the language in the Senate Report relating to the utilization of operating subsidies for section 236 projects."

Conf.Rep. H.R. No. 1503, 93d Cong., 2d Sess. 5 (1974).

70. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). This section of the report reads:

"In evaluating the feasibility of any new project which is proposed to be assisted under the Section 236 program, the Secretary should take into account his authority to use operating cost subsidies in case there is an increase in utility costs and local property taxes."

71. *Commonwealth of Pennsylvania v. Lynn,* 163 U.S.App.D.C. 288, 501 F.2d 848, 861 (1974).

72. *See* S.Rep. No. 1091, 93d Cong., 2d Sess. (1974).

73. *Checker Motors Corp. v. Chrysler Corp.,* 405 F.2d 319, 323 (2d Cir. 1969).

74. Plaintiff Dubose alleges that unless the rent increase were rescinded, her rent would constitute 61% of her income, and 78% of her "adjusted monthly income" as calculated according to the HUD Handbook, 4510.1 paragraph 10–7, page 10–6. The same figures apply to the other named plaintiff in *Dubose,* Ms. Daigle. The named plaintiffs in *Walter,* Ms. Walter and Mr. Cortese, would be required to pay 73% and 35.9% of their respective incomes, or 92% and 39.9%, again respectively, of their HUD-calculated "adjusted monthly incomes." Ms. Little, named plaintiff in the third lawsuit here, alleges that 41% of her income and 52% of her "adjusted monthly income" will have to go for rent.

75. The dispute in *Little* concerning the applicability and effect of the provisions for separate utility metering, *see* note 15 *supra,* explains why this amount is so much lower. As of this time the tenants at East Hartford Estates are paying their own electric bills, with the result that increases in electricity costs were not included in the proposed rent increase.

76. *ITT v. Vencap, Ltd.,* 519 F.2d 1001, 1019 n.33 (2d Cir. 1975).

77. Affidavit of H. R. Crawford, at 6, (Oct. 15, 1975), as supplemented by Letter of November 20, 1975 from Marjorie A. Wilhelm, Assistant
U. S. Attorney, to this court. The plaintiffs in *Walter* contend that even this figure is too low, because of changes in the method for collecting the excess rentals promulgated by HUD in its Transmittal No. 24 of June 6, 1975, for inclusion in the Insured Project Servicing Handbook. That transmittal permits project owners to deduct their collection losses before making the required payments to the reserve fund. The plaintiffs are free to raise this issue at the trial on the merits; I need not rule on it at this time as there appear to be sufficient moneys in the reserve fund to implement the "operating subsidy" program as it stands now.

78. Affidavit of H. R. Crawford, at 6 (Oct. 15, 1975).

79. Subsection (g) of Section 236 permits the reserve fund moneys to be used to make the additional assistance payments "until the end of the next fiscal year." The Act was adopted during Fiscal Year 1975, and contains the two-year extension of the 236 program, through the end of the 1976 Fiscal Year. I construe the phrase "next fiscal year" in subsection (g), therefore, to refer to Fiscal Year 1976. I note in passing at this point that the Secretary also has available approximately $55 million of

unobligated contract authority, which she could use to implement the "operating subsidy" program. Affidavit of A. J. Kliman, at 3 (Oct. 9, 1975).

80. *Miguel v. McCarl,* 291 U.S. 442, 54 S.Ct. 465, 78 L.Ed. 901 (1934).

81. 12 U.S.C. § 1715z–1(f)(3) (Supp. IV, 1974).

82. Brief of Defendant Carla Hills, at 7. HUD also approved the $10 per unit rent increase challenged in *Walter,* Brief of Plaintiff, at 10, and the $9.36 per unit rent increase challenged in *Little,* Brief of Plaintiff, at 4.

Vernice DUBOSE et al.

v.

Patricia HARRIS et al.

Claudia WALTER et al.

v.

Patricia HARRIS et al.

Janette LITTLE et al.

v.

Patricia HARRIS et al.

Mae PLEASANT et al.

v.

Patricia HARRIS et al.

Pantaleon MORALES et al.

v.

Patricia HARRIS et al.

Cathy ADAMS et al.

v.

Patricia HARRIS et al.

Merry E. GRUNDMAN et al.

v.

Patricia HARRIS et al.

Joann JOHNSON et al.

v.

Patricia HARRIS et al.

Civ. Nos. H–75–303, H–75–345, H–75–346, H–76–26, N–76–44, H–76–89, H–76–160 and N–76–109.

United States District Court,
D. Connecticut.

Feb. 23, 1979.

Eight lawsuits were consolidated concerning the refusal of the Secretary of Department of Housing and Urban Development to implement an operating cost subsidy program pursuant to the Housing and Community Development Act. In ruling on stipulation for settlement, the District Court, Blumenfeld, J., held that settlement which would result in payments to eligible claimants in greater amounts than would have been available through ultimately succesful litigation and which received support of all plaintiffs in suit would be approved as fair, reasonable and adequate.

Order accordingly.

James C. Sturdevant, San Fernando Valley Neighborhood Legal Services, Inc., Pacoima, Cal., for plaintiffs in Dubose, Walter, and Johnson.

John A. Dziamba, Connecticut Legal Services, Willimantic, Conn., for plaintiffs in Walter.

Dennis J. O'Brien, Connecticut Legal Services, Willimantic, Conn., for plaintiffs in Dubose.

Raymond R. Norko, Joan E. Pilver, Legal Aid Society of Hartford County, Hartford, Conn., for plaintiffs in Little.

Robert Wenten, Ronald Rosenstein, Connecticut Legal Services, Torrington, Conn., for plaintiffs in Grundman.

Martin N. Korn, Connecticut Legal Services, Danbury, Conn., for plaintiffs in Johnson.

Sue Ann Shay, Neighborhood Legal Services, Hartford, Conn., for plaintiffs in Pleasant.

Bruce A. Morrison, New Haven Legal Assistance Assn., New Haven, Conn., for plaintiff in Morales.

Martin Zeldis, Connecticut Legal Services, New London, Conn., for plaintiffs in Adams.

Maryann Clifford, Civil Div., U. S. Dept. of Justice, Washington, D. C., Kathleen H. McKay, U. S. Dept. of Housing and Urban Development, Washington, D. C., Robert S. Greenspan, U. S. Dept. of Justice, Civ. Div., App. Section, Washington, D. C., Cheryl B. Watley, Asst. U. S. Atty., New Haven, Conn., for the Federal defendants.

RULING ON STIPULATION FOR SETTLEMENT

BLUMENFELD, District Judge.

These eight lawsuits, which have been consolidated,[1] concern the refusal of the Secretary of the Department of Housing and Urban Development ("HUD") to implement an operating cost subsidy program enacted as Section 212 of the Housing and Community Development Act of 1974, 12 U.S.C. § 1715z-1(f)(3) and (g).[2] That program was designed by Congress to subsidize rising tax and utility costs so that those costs would not have to be borne by either tenants or project owners.

Now before this Court for consideration is the Stipulation for Settlement executed by counsel for plaintiffs and the Secretary of HUD. If approved the Stipulation provides that these and other actions[2] will be compromised and that eligible tenants and project owners nationwide will receive up to approximately $60 million. Before addressing the fairness, reasonableness and adequacy of the proposed settlement, however, it is necessary to detail the history of this litigation.

I.

HISTORY

On December 15, 1975, this Court entered a preliminary injunction ordering the implementation of the program at three housing projects in Connecticut federally subsidized pursuant to Section 236 of the National Housing Act, as amended. *Dubose v. Hills,* 405 F.Supp. 1277 (D.Conn.1975). The injunction required the payment of operating subsidies coterminous with the effective date of the rent increases.[4]

In the months following the December 15, 1975, preliminary injunction six more suits were filed in this District, five of which remains pending. As a result on May 27, 1976, this Court granted the plaintiffs' motion to expand the individual classes certified by project into a statewide class.

> In view of the Secretary's continued refusal to implement the operating cost subsidy program for all Section 236 projects, and the multiplicity of litigation on this issue now developing in the District of Connecticut, the motion to recertify the class is granted. *Dubose, supra,* 22 F.R.Serv.2d, at 477.

The recertified class was

> comprised of all persons who now reside, or may at some future time reside, at one of the 101 housing projects in Connecticut eligible to receive an interest subsidy under Section 236 at which there has been a rent increase and who pay or will pay more than 30% of their "adjusted family income" for rent as of the date the basic monthly rent was determined for each project. *Id.,* at 478 (footnote omitted).

Recognizing that the "same relief [was] necessary to enforce the existing preliminary injunction with respect to the remaining Section 236 projects," HUD was enjoined from refusing to pay subsidies "to each project owner, [now part of the certified class] commencing with the rental payments due June 1, 1976, or the effective date of the rent increases whichever is later." *Id.,* at 478–479.

This Court's Ruling of May 27, 1976, was appealed by the Secretry to the Court of Appeals for the Second Circuit.[5] On September 27, 1976, this Court denied the Secretary's motion to dissolve the May 27, 1976, preliminary injunction based upon the passage of Pub.L.No.94–378, the Housing and Urban Development and Independent Agencies Appropriation Act (Aug. 9, 1976), 90 Stat. 1095. That legislation appeared to alter the uses for the rental reserve fund, 12 U.S.C. § 1715z-1(g), the primary source of payment of the operating subsidy program. The Conference Report provided, however, that "the committee of conference is agreed that this action shall not prejudice any suit now or hereafter

before the courts in this area."[6] This Court accordingly included based upon this language:

> [T]hat portion of the fund necessary to maintain a *full* operating subsidies program in Connecticut must be so allocated. Only in this way will the relief granted by my earlier orders not be "prejudiced." *Dubose v. Hills,* 420 F.Supp. 399, 403 (footnotes omitted), *appeal pending* No. 76–6181 (2d Cir.).[7]

On October 18, 1976, the Supreme Court issued a stay of permanent injunctive relief against the Secretary in *Harris v. Underwood,* 429 U.S. 892, 97 S.Ct. 250, 50 L.Ed.2d 175 (1976), *staying* 414 F.Supp. 526 (D.D.C. 1976), *appeals pending* Nos. 76–1603 and 76–1650, a national class action challenge to HUD's failure to implement the operating cost subsidy program.[8]

Relying on the Supreme Court's stay in *Underwood,* the Secretary renewed her motion to the Second Circuit for a stay pending appeal of the May 27, 1976, and September 27, 1976, Rulings. On December 27, 1976, the Second Circuit issued a stay. *See also, Dubose v. Harris,* 429 U.S. 1085, 97 S.Ct. 1092, 51 L.Ed.2d 531 (1977), *applic'n to vacate stay denied.*

On May 9, 1977, this Court issued its Ruling on Motion for Contempt filed by the plaintiffs, *Dubose v. Harris,* 434 F.Supp. 227 (D.Conn.1977). Therein, I concluded without finding the Secretary in contempt, that HUD's termination of operating subsidy payments to those five Section 236 project owners previously mandated by the preliminary injunction of December 15, 1975, which the Secretary never appealed, was unjustified and that the payments must be resumed back to the date of termination.

Section 206 of Pub.L.No.95–128, 91 Stat. 1111 (Oct. 13, 1977), the Housing and Community Development Act of 1977, revised the 1974 operating subsidy program mandated in 12 U.S.C. § 1715z-1(f)(3) and (g).[9] Accordingly, on June 8, 1978, in the Ruling on Motion to Modify the Court's Order for Injunctive Relief in *Dubose,* this Court held that

the 1974 provisions were operative between February 18, 1975 and October 1, 1977. Thereafter the revised operating subsidy program mandated by Section 206 of the 1977 Legislation was applicable and operating subsidies previously ordered and paid under the 1974 Act were in the future to be calculated and paid pursuant to the formula in the 1977 Act. Operating subsidy payments under the 1974 Act made under my previous Orders were judicially terminated on November 13, 1978, when this Court approved the Stipulation entered into between plaintiffs and the Secretary for five of the projects involved in these cases.[10]

II.

DISCUSSION OF THE BACKGROUND OF SETTLEMENT

The foregoing demonstrates that this litigation was vigorously pursued by plaintiffs and their counsel. But the stays issued by the Supreme Court in *Underwood, supra,* and by the Second Circuit in *Dubose* as well as the grant of review by the Supreme Court in two similar cases[11] cast doubt upon my earlier pronouncement that "the plaintiffs will almost surely succeed in obtaining permanent injunctive relief," *Dubose, supra,* 405 F.Supp., at 1292, and upon the unanimous rejection of the Secretary's claims under the 1974 program by the federal judiciary.[12]

As a result plaintiffs' lead counsel in these and the other three principal cases of *Underwood, Ross,* and *Abrams, supra,* initiated settlement negotiations with counsel for the Secretary of HUD in November, 1977. The culmination of those negotiations was the execution on September 26, 1978 and October 13, 1978 of a Settlement Agreement.[13] On November 8, 1978, plaintiffs and the Secretary in these actions filed their Stipulation for Settlement. After a hearing on November 13, 1978, this Court issued its Order for Hearing on Settlement and ordered notice to be given to members of the statewide classes of tenants and Section 236 project owners.[14] On the same date a final hearing was scheduled for the full consideration of the proposed settlement by this Court. On January 29, 1979, the final hearing was held[15] and no oral objections were presented.[16]

III.

MAJOR TERMS OF THE STIPULATION FOR SETTLEMENT

The Stipulation for Settlement filed in these cases provides that the sum of $59,$872,666.80 be available for distribution on a nationwide basis to eligible tenants and project owners who would have received the benefits of the 1974 operting subsidy program mandated by Congress had the Secretary of HUD implemented the program without litigation. This sum equals the entire amount deposited by Section 236 project owners nationwide into the excess rental reserve fund, 12 U.S.C. § 1715z-1(g), from February 18, 1975 through September 30, 1977. This is the precise period during which the operating subsidy provisions of Section 212 of Pub.L.No.93–383, the Housing and Community Development Act of 1974, were in effect.[17]

The Stipulation for Settlement provides a formula for selecting eligible recipients, a formula which closely parallels the 1974 statutory enactment.[18] Secondly, the Stipulation provides the formula for the amount of payments each eligible tenant[19] and each eligible project owner[20] will be eligible to receive. Moreover, with particular applicability to these cases is the subparagraph of the Stipulation which provides that tenants who have already received operating subsidy payments pursuant to Court order shall be entitled to receive a payment under the proposed settlement if the payments provided for in the formula exceed the ones already received.[21]

Finally, in this regard, the Stipulation provides for those situations in which valid claims exceed the amount of the settlement fund or are insufficient to exhaust the fund.[22] In the former case there will be a "pro rata distribution" among all eligible claimants including project owners. In the latter situation any excess remaining in the fund "shall be returned to HUD and shall be credited to the reserve fund established by Section 236(g) of the National Housing Act, as amended." Stipulation for Settlement, para. 3e.

The Stipulation also calls for the employment of Price Waterhouse & Co., a major national accounting firm, to assist in giving notice to tenants and project owners, to distribute and process claim forms, and to administer the distribution of the settlement fund. Stipulation for Settlement, para. 4a. Subject to Court approval the parties have further agreed that the costs of notice, administrative costs incurred by the accounting firm and the investment agent, and the administrative and out-of-pocket costs incurred by plaintiffs' counsel in these and the other three principal cases[23] in connection with obtaining judicial approval of the proposed settlement shall be paid from the settlement fund prior to the payment of claims to eligible recipients. Stipulation for Settlement, para. 4c. However, the Stipulation expressly provides that "none of the sums distributed may be used to pay attorney's fees." *Id.*, para. 3f.

The complexity and comprehensiveness of the Stipulation for Settlement are readily apparent. In addition to the major provisions discussed above, the Stipulation provides in intricate detail for the provision and issuance of final notice and claim forms to all potentially eligible claimants,[24] for HUD to make available data required to determine eligibility and compute payments,[25] and for the procedures under which the costs of mailing notices and claim forms shall be paid by HUD.[26] Finally, the Stipulation provides that the Courts having jurisdiction over the settlement shall retain jurisdiction "[to] determine any issue or dispute relating to the settlement or to payment of claims." Stipulation for Settlement, para. 7.

IV.

FAIRNESS AND REASONABLENESS OF THE SETTLEMENT

[1] The issue now before this Court is whether the settlement as described above is reasonable, fairly and adequately protects the interests of absent class members, and should therefore be approved. The Court finds that mea-

sured against any and all of the criteria relevant to that inquiry, as discussed below, this settlement in all its detail merits the wholehearted approval of the Court.

A. The Plaintiff Class Gains More By This Settlement Than By Successful Litigation On The Merits.

[2] The factors which this Court would ordinarily consider in deciding whether or not a settlement should be approved all involve a comparison between what class members gain by the settlement and what they could obtain by litigation. *See, Newman v. Stein,* 464 F.2d 689, 692 (2d Cir.), *cert. den.* 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972) and *Levin v. Mississippi River Corporation,* 59 F.R.D. 353, 361 (S.D. N.Y.), *aff'd* 486 F.2d 1398 (2d Cir.), *cert. den. sub nom. Wesson v. Levin,* 414 U.S. 1112, 94 S.Ct. 843, 38 L.Ed.2d 739 (1973), *reh. den.* 415 U.S. 939, 94 S.Ct. 1457, 39 L.Ed.2d 497 (1974) (whether settlement is within the range of reasonableness given the probabilities of ultimate success were the action litigated); *West Virginia v. Chas. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir.), *cert. den.* 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971) (balancing strengths of the plaintiffs' case on the merits against the amount offered by settlement); and *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974) (weighing the complexity, expense, likely duration of the litigation, and risks of litigation against the plaintiffs' best possible recovery and the ability of defendants to withstand a greater judgment.) *See also, Herbst v. International Tel. & Tel. Corp.,* 72 F.R.D. 85, 90 (D.Conn.1976).

In this case, the plaintiffs as a class will actually realize a greater recovery by this settlement than by ultimate success on the merits. Were plaintiffs in all of the pending operating subsidy cases to pursue litigation and ultimately win, by a favorable ruling of the Supreme Court in *Ross* and *Abrams,* the total amount of money available for distribution to all of the tenants in all of the cases would be the amount in the reserve fund, as of September 30, 1977, an amount approximating $60 million, because no other

funds are available for payment of operating subsidies since Congress directed that money deposited into the reserve fund after that date be used for other purposes.[27] By settlement, plaintiffs obtain that exact total recovery—approximately $60 million. Thus, as a group plaintiffs suffer no diminution in total recovery by settling on the terms submitted to the Court for approval. In fact, plaintiffs will probably realize a greater recovery by settling than by prevailing on the merits since the total available for distribution under the settlement is being increased daily by interest earned.[28]

In addition, each individual class member will in all likelihood realize a recovery by settlement equal to the maximum recovery that could have been realized by success on the merits. Each individual's claim will be calculated based on actual increases in taxes and utilities at his or her Section 236 housing project over the actual, relevant period during which the claimant lived in the project. Although it is true that eligibility will be measured as of one of three dates, rather than on a month-by-month basis, that compromise was necessary to make the calculation of claims and administration of the settlement feasible.[29] Exact mathematical precision is not required, and the persons who will benefit by the settlement nationwide reasonably approximate those who would have benefitted had HUD implemented the operating subsidy program without litigation or pursuant to Court order. *See, e. g., Levin, supra,* 59 F.R.D., at 369, 371; 3 *Newberg on Class Actions,* § 5610a, 487 (1977).

Further, the settlement ensures that tenants will receive payment more promptly than if the cases proceeded through litigation. Thus the settlement also ensures that a greater number of eligible persons will receive payments than if resolution of this controversy had to await the end of litigation, since tenant turnover causes more claimants to become difficult, if not impossible, to locate the longer distribution of the money available for payment of operating subsidies is delayed.

Moreover, the settlement provides a method for administering distribution of payments in a prompt and efficient manner by Price Waterhouse & Co., an accounting firm of national reputation for excellence and integrity, to be overseen by a committee of experienced counsel thoroughly familiar with and involved in the two major operating subsidy cases—these actions and *Underwood* the nationwide action—who are well attuned to the interests of their clients and all of the issues which might arise during distribution. The operations of Price Waterhouse & Co., supervised by capable counsel, should cost less, proceed more promptly, and result in greater recoveries than administration of the distribution by HUD.[30]

Thus plaintiffs by settling on the terms presented to the Court, will receive more money, sooner, by a method more efficiently administered than if they were to pursue their actions and obtain the best possible litigated recovery. Considering that plaintiffs ran some risk of recovering nothing if they proceeded by litigation, it is extraordinary that they have been able to procure this settlement. The Court is hard-pressed to imagine a case in which a weighing of the benefits of the settlement against the benefits of litigation more strongly favors approval of the settlement.

B. Support For The Settlement By Interested Parties Reaffirms Its Reasonableness.

[3] An additional factor bearing on the adequacy and reasonableness of the settlement is the reaction of class members. *City of Detroit v. Grinnell Corp., supra,* 495 F.2d, at 463. All tenant members of the *Dubose* class who appeared in Court at the hearing for final approval expressed support through counsel for the settlement and an understandable interest focused on receiving the substantial recoveries to which the settlement entitles them as soon as possible.

In addition, this Court is informed that attorneys for plaintiffs in approximately forty other suits not directly involved in the negotiations that led to settlement of *Du-*

bose, Underwood, Ross, and *Abrams* have been informed of the terms of settlement submitted to this Court and invited to resolve their suits on the same terms, through the same claim and distribution process. The Court is informed that counsel for plaintiffs in this action and in the nationwide action, *Underwood,* have received to date favorable responses from counsel in nineteen of those other cases indicating their desire to settle on the same terms as presented to this Court.[31]

C. *Objections Made To The Settlement Are Without Merit.*

This Court finds to be wholly without merit several criticisms of the proposed settlement raised by the National Association of Housing Managers and Owners (NAHMO), an organization representing the interests of Section 236 project owners.[32]

First, NAHMO suggests that tenants would prefer to have the reserve fund used for prospective subsidies, i. e., for credits against future rents, under the Housing and Community Development Act of 1977, rather than for payment of lump sum, retroactive operating subsidy payments to reimburse tenants for actual financial deprivations experienced between February, 1975 and October, 1977, the period covered by the 1974 Act and the settlement. NAHMO's suggestion is belied by the facts that no tenants have themselves indicated such a preference, that tenants' own counsel have indicated no such preference, and that, on the contrary, individual tenants who appeared at the hearing for final approval and their counsel fully support the use of the settlement fund for retroactive benefits.

NAHMO also suggests that the proposed settlement favors former tenants over current tenants, and that current tenants would object if they were aware of the discrimination. The Court concludes, however, that in fact there is no unequal treatment. All eligible tenants, whether or not they are now residing in a Section 236 project, will receive

a payment reflecting the actual harm they suffered between February 1, 1975 and October 1, 1977, payment to be made from money accumulated in the reserve fund as of September 30, 1977. Those current tenants who in addition should benefit under the 1977 Act have available to them funds accumulated since October 1, 1977. The unfortunate fact that more money is needed to fully implement the 1977 Act should not be visited upon past tenants. *Cf. Taylor, supra,* at 96 (D.Conn. 1978).[33]

Further, this Court concludes that utilization of the reserve fund for prospective rent credits would be inappropriate. The 1977 Act provides that all Section 236 tenants, not just the low-income tenants who are represented in the 1974 operating subsidy cases, receive the benefit of operating subsidy payments. Thus, were the settlement fund to be distributed under the 1977 Act, much of it would go to persons who are not members of the classes certified in the 1974 operating subsidy cases, and the benefits accruing to members of those operating subsidy classes would be reduced. Obviously, counsel for plaintiffs would not have been acting in the best interest of their clients had they negotiated such a settlement.

NAHMO urges, nonetheless, that the settlement fund should be distributed prospectively under the 1977 Act because Section 236 project owners would be benefitted thereby. Undoubtedly they would be benefitted, but they should not be so benefitted to the detriment of low-income tenants who were the primary intended beneficiaries of the 1974 Act. Although NAHMO suggests that tenants did not bear the burden of rising property taxes and utilities, and that project owners bore the burden instead, the Court sees no evidence that costs were not passed on to tenants, either directly by increased rents or indirectly by decreased maintenance and services, other than the fact that some project owners may have been enjoined from increasing rents or agreed not to increase rents after being sued by tenants. Such project owners, for whom there is evidence of withheld

rent increases, in fact will be reimbursed out of the settlement fund. Stipulation for Settlement, para. 3d. Thus, they have no cause for complaint.

As to the other project owners who might claim that they did not pass on increasing costs, directly or indirectly, the Court can only recognize that it is not administratively feasible, or even possible, to identify such project owners.[34] And, even if it were possible, it is not the function of this Court to remake the settlement agreed to by plaintiffs' counsel and HUD. *See, Levin, supra,* 59 F.R.D., at 361. The settlement is fair and reasonable and will benefit those persons whom Congress primarily intended to benefit when it adopted the 1974 Act. NAHMO's assertion to the contrary, Congress did not intend, in adopting the 1977 Act, to foreclose settlement of the operating subsidy cases on the terms presented to this Court.[35]

In addition to the memoranda of NAHMO, one other document was filed indicating some reservations, not about the settlement, but about the advisability of this Court delaying approval of the settlement. That document consisted of a declaration by counsel in *Abrams,* later supported by a reply memorandum, pointing out that a "dispute" exists between plaintiffs' counsel in this statewide action, the nationwide action *Underwood,* and *Ross,* on the one hand, and plaintiffs' counsel in *Abrams* on the other hand. This dispute apparently involved the contention of counsel in *Abrams* that a Special Master should be appointed by the Court in *Underwood* to oversee distribution, even though the settlement documents signed by counsel in all the settling cases—*Dubose, Underwood, Ross,* and *Abrams*—do not provide for a Special Master. This Court sees no reason to delay its own decision on the fairness and reasonableness of the settlement as expressed in the Stipulation for Settlement signed by plaintiffs' counsel and counsel for the Secretary of HUD in these actions. This Court is satisfied that no Special Master should be appointed, and that the interests of the *Dubose* class will be adequately protected by the administration of the distribution by Price Water-

house & Co., which has already demonstrated its thorough grasp of the problems of distribution,[36] advised by a group of counsel which includes James C. Sturdevant, who has demonstrated his capabilities to the satisfaction of this Court,[37] and plaintiffs' lead counsel in the *Underwood* case, who have litigated the nationwide action since its inception.[38]

CONCLUSION

The parties have negotiated a fair, reasonable, and adequate settlement, effectively administered, which will result in payments to eligible claimants and in greater amounts than would be available through ultimately successful litigation. The Stipulation for Settlement is hereby approved with the congratulations of the Court.

SO ORDERED.

APPENDIX

STIPULATION FOR SETTLEMENT

WHEREAS these actions were filed in 1975 and 1976 to compel payment of tax and utility cost subsidies by the defendant Secretary of the United States Department of Housing and Urban Development (HUD) on behalf of low-income tenants residing in housing projects subsidized by HUD pursuant to the National Housing Act, 12 U.S.C. § 1715z-1 (Section 236);

WHEREAS this Court on May 27, 1976, certified a plaintiff tenant class of all persons who now reside, or may at some future time reside, at one of the 101 housing projects in Connecticut eligible to receive an interest subsidy under Section 236 at which there has been a rent increase and who pay or will pay more than 30% of their "adjusted family income" for rent as of the date the basic monthly rent was determined for each project;[1] which class by order of June 8, 1976 was explicitly exempted from the nationwide class certified in *Underwood v. Hills,* 414 F.Supp. 526 (D.D.C.);

WHEREAS this Court on May 27, 1976, extended the preliminary injunction previously issued in *Dubose v. Hills,* 405 F.Supp. 1277 (D.Conn.1975), to the statewide plaintiff class ordering the defendant Secretary of HUD to make tax and utility cost subsidy payments from June 1, 1976 forward, pursuant to 12 U.S.C. § 1715z-1(f)(3) and (g);

WHEREAS these actions have been consolidated for trial by this Court;

WHEREAS the Secretary of HUD appealed from the statewide preliminary injunction entered by this Court on May 27, 1976, as modified in *Dubose v. Hills,* 420 F.Supp. 399 (D.Conn.1976), to the United States Court of Appeals for the Second Circuit;

WHEREAS on December 27, 1976, the United States Court of Appeals entered a stay of this Court's statewide preliminary injunction until the stay issued by the United States Supreme Court in *Underwood v. Harris,* on October 18, 1976, is dissolved;

WHEREAS the plaintiffs and federal defendants in *Underwood v. Harris* will be jointly seeking reference of that case to the District Court from the United States Court of Appeals for the District of Columbia Circuit to consider and implement the Settlement Agreement;

WHEREAS the plaintiffs and defendant Secretary of HUD in these actions and in the other action mentioned herein desire to settle and dispose of these actions and of the other actions upon the terms and conditions hereinafter set forth;[2]

NOW, THEREFORE, it is hereby agreed as follows:

1. A Stipulation for Settlement containing identical terms to those set forth herein has been, or will be, filed, and court approval will be sought in the appropriate District Courts in *Underwood v. Harris, Harris v. Ross,* and *Harris v. Abrams.*

2. *Settlement Fund.* The plaintiffs and federal defendants, pursuant to paragraph 6 of the Settlement Agreement, will move the District Court in *Underwood v. Harris* to order the Secretary of HUD to pay to _____, an escrow agent selected by plaintiffs' counsel in these actions, and in the other actions listed in paragraph 1 herein, a portion of the money currently credited to the reserve fund established pursuant to 12 U.S.C. § 1715z-1(g) which is equal to the amount credited to that fund as of September 30, 1977 (a sum of $59,872,666.80). That money will be invested by the escrow agent in obligations guaranteed by the full faith and credit of the United States in order to maximize the sum available for distribution. The money deposited with the escrow agent, plus any interest earned on investment of that money, shall constitute the fund available for payment of claims, as well as for payment of certain costs incurred by plaintiffs' counsel, the escrow agent, and Price Waterhouse and Co., as more fully described and limited below in paragraph 4c, and for costs of printing notices and claim forms to be sent to class members as required by this settlement and of purchasing envelopes for those notices and forms, as more fully described below in paragraph 6a and 6b.

3. *Amount of Payments to Eligible Recipient.* The settlement fund shall be distributed to eligible recipients in the manner and in the amounts described below:

a. *Formula for Selecting Eligible Recipients.*

Every tenant who resided in a Section 236 project, including projects financed by state housing agencies, between February 1, 1975 and September 30, 1977, and who paid in excess of 30 percent of his or her adjusted monthly income (as defined in 24 C.F.R. § 236.2(a)(1) and (3) for rent (25 percent in cases where direct tenant payment of one or more utility charges, except telephone, was approved by HUD), as of the last month of residence in the project, the last month before receiving a federal rental subsidy, or September, 1977, whichever is earlier, will be eligible to receive

retroactive tax and utility cost subsidy payments under this settlement. The tenants eligible to share in the distribution of the settlement fund are those who satisfy the requirements of this paragraph 3a. and who are members of the class certified in these actions, of the classes in cases specified in paragraph 1, or of a class in any other suit brought to compel payment of tax and utility cost subsidies pursuant to 12 U.S.C. § 1715z-1 who elect to participate in this settlement.

b. *Amount of Payments.*

Each eligible recipient, as defined in paragraph 3a, shall receive a lump sum payment equivalent to the number of months between February 1, 1975 and September 30, 1977, during which he or she resided in a Section 236 project without receiving an additional federal rental subsidy, multiplied by the tenant's monthly share of the actual increases in tax and utility costs as of September 30, 1977 at that Section 236 project. A tenant's monthly share will be calculated by determining the amount by which tax and utility costs for the period October 1, 1976 to September 30, 1977 exceed the initial operating expense level established for that Section 236 project and by then dividing that amount by twelve months and by the number of residential units in that project.

c. Tenants who have received the benefit of tax and utility cost subsidy payments pursuant to court order shall be entitled to receive the difference between the tax and utility cost subsidy payments already made on their behalf pursuant to such court order and the tax and utility cost subsidy payment to which they are eligible under this settlement.

d. Where a project owner has been enjoined from collecting a HUD-approved rent increase, or has agreed not to collect such an increase by reason of specific litigation brought on behalf of tenants in that project to compel implementation of the tax and utility cost subsidy provisions

of the Housing and Community Development Act of 1974, those sums owing to the eligible tenants of such project for those months in which a HUD-approved increase or a portion thereof was enjoined or forborne will be distributed to the project owner rather than the tenants in an amount not to exceed the portion of the rent increase attributable to increases in taxes and utility costs actually enjoined or forborne by the owner. Any amount owing to the tenant in excess of the amount actually enjoined or forborne by the project owner shall be paid to the tenant. HUD shall inform Section 236 project owners of their potential eligibility for tax and utility cost subsidy payments as a result of enjoined or forborne rent increases.

e. In the event claims submitted and approved for payment exceed the amount of the settlement fund, including whatever interest may accumulate prior to distribution of the fund and after costs of notice and administration as described in paragraphs 4c. and 6a. and 6b. have been paid, there will be a pro rata distribution of the fund among all eligible claimants, including project owners as defined in paragraph 3d. If claims submitted and approved for payment are insufficient to exhaust the fund, any money which remains after all claims are paid and costs of notice and administration have been paid shall be returned to HUD and shall be credited to the reserve fund established by Section 236(g) of the National Housing Act, as amended.

f. None of the sums distributed may be used to pay attorney's fees.

4. *Distribution of Settlement Fund.*

a. Employment of Price Waterhouse.

Plaintiffs' counsel in these actions and in the cases listed in paragraph 1 above obtained estimates of the cost of implementing this settlement from several major accounting firms and, based on those estimates, interviews with the firms, and discussions with and consent of the

federal defendants, have selected Price Waterhouse and Co. to assist in giving notice to the plaintiff classes, to distribute and process claim forms, and to administer the distribution of the settlement fund, in the manner described in their "Proposal To Conduct A Settlement Distribution In Connection With *Underwood v. Hills* and *Dubose v. Hills,* August 9, 1978," as modified by letter of Price Waterhouse to Patricia M. Tenoso dated September 6, 1978 and subject to court approval (which documents have been filed in *Dubose v. Harris,* Civil No. H-75-303 (D.Conn)).

b. *Mechanics of Distribution.*

Price Waterhouse and Company shall, under the direction of plaintiffs' counsel in these actions and in the other cases listed above in paragraph 1, run a limited pilot test of claim forms with the view to designing a claim form which will maximize the accuracy of claims, shall arrange for printing, and for purchase of envelopes for mailing all notices and all claim forms, as described in paragraph 6, and shall mail such notices and forms using HUD's franking privilege in the manner described in paragraph 4d. After notices of the final settlement and claim forms have been sent to class members, those class members will have 60 days to submit those forms to Price Waterhouse which will promptly review those forms for completeness and seek additional information from claimants on any incomplete claims. Price Waterhouse will then promptly review all completed claims and notify all claimants of any claims or portions of claims which have been disallowed. Claimants will have 15 days after notification that a claim has been disallowed to contest that adverse determination by Price Waterhouse. After that time, Price Waterhouse will make lump sum payments to all eligible recipients as set forth in paragraphs 3a. and 3b. Price Waterhouse will include with each payment mailed to an eligible claimant a notice explaining the amount of payment and how the amount was calculated. If a claim is rejected, the claimant will receive an explanation of reasons for rejection, such as that tenant income exceeded allowable limits. However, no claims shall

be paid pursuant to this paragraph 4b. until this Court and all four District Courts involved in the cases listed in paragraph 1 have given final approval to the settlement and until all costs of administration and distribution have been paid pursuant to paragraph 4c.

c. *Costs of Administration and Distribution To Be Paid From Settlement Fund.*

All costs of administration or out-of-pocket costs, including travel, incurred by plaintiffs' counsel in these actions and in the actions listed in paragraph 1 in connection with obtaining approval of this settlement, administration of the settlement, and distribution of the settlement fund shall be paid from the settlement fund prior to payment of claims pursuant to paragraph 4b., subject to Court approval. In addition, the cost of printing all notices and claim forms as described in paragraph 6, and of purchasing envelopes for mailing such notices and forms shall be paid from the settlement fund prior to payment of claims pursuant to paragraph 4b., subject to Court approval.

All costs incurred by the escrow agent and by Price Waterhouse and Co. in investing, administering, and distributing the settlement fund shall be paid from the settlement fund prior to payment of claims pursuant to paragraph 4b., subject to Court approval; however, all costs incurred by Price Waterhouse prior to final approval of this settlement by this Court and by the District Courts in the other cases listed in paragraph 1, excluding costs of printing notices as described in paragraph 6a. and of purchasing envelopes to mail such notices, shall be paid from the settlement fund only to the extent of the interest accrued by the fund prior to final approval or disapproval of the settlement. Plaintiffs' counsel in these actions, and in the other cases listed in paragraph 1, and Price Waterhouse shall make reasonable efforts to minimize the costs of administration of the settlement and distribution of the settlement fund.

d. *Limited Costs of Administration and Distribution To Be Paid By HUD.*

HUD shall reimburse the United States Postal Service for postage on all communications intended to aid in the implementation of this settlement by arranging with the Postal Service for contractor use of a permit imprint. Once HUD has obtained authorization for Price Waterhouse to present official mail under the permit imprint, Price Waterhouse will submit Postal Service Form 3602, "Statement of Mailing With Permit Imprints," whenever presenting mailings at the particular post office designated as point of entry in the Department's "Application for Contractor Use of Agency Official Mail" submitted to the Postal Service. HUD shall also make a WATS line available for use by plaintiffs' counsel. HUD shall reimburse Price Waterhouse for the cost of assembling and copying documents requested by HUD pursuant to paragraph 4e. It is the intent of the parties that distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD.

e. *HUD Audits and Reviews of Price Waterhouse Expenses and of Distribution.*

Price Waterhouse will submit to HUD reports concerning tasks performed by it and its recommendations when it completes the pilot test, prior to commencement of distribution of the settlement fund, and at such other times as HUD may request or as the Court may direct; these reports shall be certified by Price Waterhouse to be accurate and precise. Price Waterhouse will make its books and records relating to the discharge of its functions pursuant to the settlement available for audit at any time upon request of the Government. Price Waterhouse will provide the Government, upon demand, with copies of any document in its possession that relates to the discharge of its functions under the settlement.

5. *Information to be Provided by HUD.* HUD's Central Office shall provide Price Waterhouse, within a reasonable

period of time, with a list of every Section 236 project. That list shall include the following information on each project:

a. Project name;
b. Project address of record;
c. HUD's identifying number and suffix;
d. The HUD region in which the project is located;
e. The number of rental units in the project;
f. The date the project reached sustaining occupancy;
g. The amount by which tax and utility costs for the period from October 1, 1976 to September 30, 1977, exceeded the initial operating expense level established for the project;
h. An indication as to whether the project is receiving either deep subsidy or rent supplement payments;
i. The number or percentage of units under contract to receive a federal rental subsidy; and
j. The name, address, and telephone number of each project's manager or owner, if readily available in HUD files.

To the extent the above information is not available in the HUD Central Office, HUD Field Offices will be requested to send this data directly to Price Waterhouse. HUD will also notify all Field Offices to comply with all reasonable requests made by Price Waterhouse. In addition, the HUD Central Office shall provide to Price Waterhouse:

k. A listing of HUD Regional and Field Offices, including addresses;
l. A listing of HUD Section 236 projects for the elderly;
m. The name and telephone number of HUD field personnel charged with overseeing Section 236 projects in each Field Office; and
n. A listing of all HUD projects whose tenants received the benefit of a tax and utility cost subsidy pursuant to court order, including the effective date of the court order and the amount of subsidy paid to the project by HUD on a monthly basis.

6. *Notices and Claim Forms.*

a. *Preliminary Notices of Proposed Settlement.*

Notices, as described in paragraphs 6(a)(1) and 6(a)(2), shall be sent to class members in these actions and in the cases listed in paragraph 1 notifying them of preliminary court approval of the settlement and of the hearing on final settlement, as required by this Court and by the District Courts having jurisdiction over the cases listed in paragraph 1.

(1) *Contents of Preliminary Notice.*

The preliminary notice will contain the following information:

(a) A statement informing recipients of notice that if they lived in Section 236 housing for any period of time from February 1, 1975 through September 30, 1977 and paid in excess of 25–30 percent of their adjusted incomes for rent they may be eligible for a retroactive tax and utility cost subsidy payment.

(b) A statement informing recipients of the notice that there will be a hearing to determine whether the settlement will be approved.

(c) A statement of the date, time, and place of the hearing.

(d) A description of the procedures for filing objections to the settlement.

(e) A statement explaining that if the settlement is approved, a notice of settlement approval, if necessary, and a claim form will be sent to them which must be filled out and submitted in order for them to be paid their share of the settlement fund.

(f) A statement explaining that the recipient of the notice need not appear at the hearing in order to share in the settlement.

(g) The name, address, and telephone number of the person to be contacted regarding questions about the proposed settlement.

(2) *Distribution and Publication of the Preliminary Notice.*

Preliminary notices will be prepared by, and contain the name of, lead counsel in each pending tax and utility cost subsidy case which is to be resolved by this settlement, and will be printed and mailed by Price Waterhouse, with postage prepaid by HUD pursuant to paragraph 4d., to all Section 236 project owners. HUD will instruct project owners to post notices in the projects and to distribute the notices to all tenants currently residing in the projects, and to provide forwarding addresses, if available, to Price Waterhouse for any tenants who have moved since February 1, 1975. HUD shall require project owners to certify to Price Waterhouse, within 15 days, that they have distributed and posted these notices. Price Waterhouse will send notices to all former tenants for whom they have forwarding addresses. Plaintiffs' counsel in these actions and in the other cases listed in paragraph 1 shall cause a copy of the preliminary notice to be published in the newsletters of the Legal Services Corporation, the National Housing Law Project, and other publications directed to legal services attorneys and their clients. HUD shall announce the proposed settlement of these cases in a special news release and shall duplicate the preliminary notice in its Consumer Affairs Letter, HUD Newsletter, and HUD Challenge. Additional notice shall be undertaken if required by the Courts. All costs of preliminary notice shall be paid from the settlement fund.

b. *Final Notices of Settlement and Claim Forms.*

Final notice of Court approval of the settlement and distribution of claim forms shall be accomplished in the following manner, as required by this Court and by the District Courts having jurisdiction over the cases listed in paragraph 1.

(1) *Notice to Current and Future Tenants.*

After final approval of the settlement by the necessary Courts, HUD shall require project owners to deliver or

mail to each current tenant in their Section 236 projects and to each applicant on the project owners' waiting lists for admission to the project, and post in three conspicuous places in each project, a notice of the final settlement and claim form to be printed by, and supplied to HUD by, Price Waterhouse. HUD shall require project owners to certify to Price Waterhouse that they have posted these notices at the project and have given the notice and claim form to all current tenants and persons on their waiting lists. Names and addresses including apartment numbers of current tenants shall be provided to Price Waterhouse. Price Waterhouse shall provide HUD with a list of all projects which have failed to certify compliance.

(2) *Notice to Former Tenants.*

To the extent such information is available, HUD shall require project owners to forward to Price Waterhouse the name and last known address of any of their former tenants who lived in their projects from February 1, 1975 through September 30, 1977, for whom such information was not already provided. HUD shall require project owners to certify to Price Waterhouse that all available forwarding addresses have been sent to Price Waterhouse, and Price Waterhouse will send a notice and claim form to every tenant for whom it has received a forwarding address.

(3) *Publication of Final Notice.*

Plaintiffs' counsel in these actions and other cases listed in paragraph 1 shall cause notice of the final settlement of this litigation to be published in the newsletters of the Legal Services Corporation, the National Housing Law Project and other publications directed to legal services attorneys and their clients. HUD shall duplicate the notice of settlement and claim form in its Consumer Affairs Letter, HUD Newsletter, and HUD Challenge. HUD shall also send to all Public Housing Authorities and to a manager or owner of all federally

assisted projects a copy of the notice of settlement and claim form and request them to post the notice and claim form in three conspicuous places in each project. Additional notice shall be undertaken if required by the Courts. All costs of giving final notice and of distributing claim forms shall be paid from the settlement fund.

c. *Failure of Project Owners to Cooperate in Distribution of Preliminary and Final Notices and Claim Forms.*

If Price Waterhouse informs HUD that it has not received a certification from a project owner that the notices of settlement and claim forms have been posted and sent to all current tenants, HUD shall promptly notify current tenants and post the notices and claim forms in three conspicuous places in that project. If Price Waterhouse informs HUD that it has not received from a project owner a certification that the notices of settlement and claim forms have been sent to all project applicants or that project owners failed to certify that a list of all available forwarding addresses of tenants who have moved out and a list of all current tenants have been provided, HUD shall promptly notify project owners that these submissions are required and shall take other appropriate and necessary action to assure compliance.

d. *Bilingual Notices and Form of Envelopes.*

All notices and claim forms shall be printed in English on one side of the document and in Spanish on the reverse. All documents mailed to tenants shall be in envelopes marked "Important Notice—Please Forward" which shall be mailed with postage prepaid by HUD pursuant to paragraph 4d.

7. *Final Disposition of Operating Subsidy Cases.* In the event this Court and the District Courts in the other cases listed in paragraph 1 approve the settlement, and the settlement fund is distributed pursuant to paragraph 4b., the parties in these actions will file a joint motion in this Court for the entry of a judgment of dismissal pursuant to

this paragraph. The District Courts having jurisdiction over the cases resolved by this settlement shall, if necessary, determine any issue or dispute relating to the settlement or to payment of claims. In the event the settlement is not finally approved in these cases and in all the cases listed in paragraph 1, or in the event the settlement cannot ultimately be effectuated, the settlement fund plus accumulated interest will be restored to HUD, less the costs of administration described in paragraph 4c. incurred to date; in either event, the parties in these actions and in the other cases listed in paragraph 1 will consent to the reimposition of the existing judgments, stays, and preliminary injunctions, and restoration of the cases to the dockets of the courts where they were docketed as of October 1, 1978. Once the existing judgments, stays, and preliminary injunctions, have been reimposed and the cases restored to the dockets of the courts where they were as of October 1, 1978, the parties reserve the right to contest and to seek to vacate or otherwise remove those judgments, stays, and preliminary injunctions.

8. *Miscellaneous.*

a. *Use of Information.*

Any information supplied by HUD to Price Waterhouse shall be used exclusively for the purpose of implementing this settlement.

b. *Effect of Subsidies on Other Governmental Benefits.*

It is the intent of the Secretary of HUD and of the undersigned attorneys for plaintiffs that any retroactive tax and utility cost subsidy payment which is made pursuant to this settlement will have no effect whatsoever on any other need based governmental benefits to which recipients of subsidy payments are eligible or entitled. It is further agreed that any payments made pursuant to this settlement shall not be included as income, resources or assets under any HUD program where eligibility or continued eligibility is defined in terms of a family's or individual's income, re-

sources or assets. The Secretary of HUD shall notify all HUD offices and project owners or managers of this provision and shall provide the undersigned plaintiffs' counsel with a copy of such notification. HUD shall also notify the United States Department of Health, Education and Welfare and the United States Department of Agriculture of this settlement and urge that these Departments not treat any payments made under this settlement as income, resources or assets in determining eligibility for governmental benefits in any program administered by these Departments.

c. *Effect of Settlement on Tenants' and Project Owners' Other Rights.*

This settlement shall not prejudice or limit in any way, including by operation of the principles of *res judicata* or *collateral estoppel,* the rights of tenants in Section 236 housing projects provided for and protected under Section 206 of the Housing and Community Development Act of 1977, Pub.L.No.95–128, nor shall this settlement prejudice the right of a Section 236 project owner to seek any rent increase that may be approvable or obtain any increase approved, by HUD.

SETTLEMENT AGREEMENT

I

1. Counsel for the plaintiff tenants and for the federal defendants in certain cases brought to compel the payment of tax and utility cost subsidies on behalf of tenants in Section 236 federally subsidized housing hereby agree to the provisions set forth herein, in addition to those contained in their Memorandum of Understanding dated January 24, 1978, in settlement of the following cases:[1]

Underwood v. Harris, Nos. 76–1603 & 1650 (D.C.Cir.); *Dubose v. Harris,* Civil No. H–75–303 (D.Conn.); *Walter v. Harris,* Civil No. 75–345 (D.Conn.); *Little v. Harris,* Civil No. 75–346 (D.Conn.); *Pleasant v. Harris,* Civil

No. H–76–26 (D.Conn.); *Morales v. Harris,* Civil No. N–76–44 (D.Conn.); *Adams v. Harris,* Civil No. H–76–89 (D.Conn.); *Grundman v. Harris,* Civil No. H–76–160 (D.Conn.); *Johnson v. Harris,* Civil No. H–76–109 (D.Conn.); *Harris v. Ross,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243; *Harris v. Abrams,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243

2. Consistent with the Memorandum of Understanding this Settlement Agreement reflects an arrangement whereby the Secretary will pay to the court in *Underwood* the amount credited to the reserve fund as of September 30, 1977 for distribution to past and present Section 236 tenants who would have qualified for tax and utility cost subsidies prior to October 1, 1977. It is the intent of the parties that any plan for distribution shall involve no substantial costs or expenditures by HUD.

3. Pursuant to paragraph 3a of the January 24, 1978 Memorandum of Understanding, plaintiffs' counsel have obtained estimates of the cost of implementing the plan for distribution of the settlement fund contained herein. An estimate is set forth in the Proposal to Conduct A Settlement Distribution In Connection With *Underwood v. Hills* and *Dubose v. Hills* prepared by Price Waterhouse & Co. and dated August 9, 1978. Plaintiffs' counsel will undertake to employ Price Waterhouse, a major national accounting firm, to assist in giving notice to the plaintiff class, to process claim forms, and to distribute the settlement fund as described in their Proposal, subject to approval by the appropriate courts. Costs of administration will be deducted from the fund prior to distribution.

4. Upon execution of this agreement, plaintiffs' counsel in the cases listed in paragraph 1 shall contact counsel for plaintiffs in the approximately 40 additional lawsuits which were filed to compel implementation of the tax and utility cost subsidy program established by the Housing and Community Development Act of 1974 to determine whether those plaintiffs desire to join in the terms of this Settlement Agreement.

5. (a) Upon execution of this agreement, the federal defendants will file, and the plaintiffs will consent to, a motion in *Harris v . Ross,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243, and *Harris v. Abrams,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243, to refer those cases to the district courts to consider and implement the Settlement Agreement, the Supreme Court, however, retaining jurisdiction. In the event the Settlement Agreement is approved and the settlement fund disbursed pursuant to paragraph 9, the parties will file a joint motion in the Supreme Court in *Ross* and *Abrams* to vacate the judgments and remand these cases for entry of the judgments of dismissal pursuant to paragraph 8, infra.

(b) Similarly, upon execution of this agreement, the federal defendants will file, and the plaintiffs will consent to, a motion in *Underwood v. Harris,* C.A.D.C., Nos. 76–1603 and 1605, to refer that case to the district court to consider and implement the Settlement Agreement, the court of appeals, however, retaining jurisdiction of the appeals. In the event the district court approves the settlement, and the settlement fund is distributed pursuant to paragraph 9, infra, the parties will file a joint motion in the court of appeals to vacate the judgment and remand the case for entry of the judgment of dismissal pursuant to paragraph 8, infra. The parties intend that the stay of the judgment entered by the Supreme Court shall remain in effect pending the district court's consideration and implementation of the Settlement Agreement.

(c) In the district courts, in *Dubose* and the other Connecticut cases, and in *Underwood, Ross,* and *Abrams,* the plaintiffs and the federal defendants will jointly move the District Courts to approve the settlement.

6. The Secretary will pay the amount credited to the excess rental reserve fund as of September 30, 1977 (a sum of approximately $60 million) for distribution pursuant to paragraph 9 of this agreement. The Secretary shall pay the entire settlement fund to the district court in *Underwood*

upon entry of an order by that court authorizing the payment pending final settlement approval. This settlement fund shall not be disbursed pursuant to paragraph 9 until all four district courts in the cases specified in paragraph 1 have approved the settlement, except that costs incurred by the accounting firm prior to final approval may be paid out of this fund to the extent of the interest accrued by the fund. As soon as the court of appeals refers *Underwood* to the district court, pursuant to paragraph 5(b), the district court in *Underwood* will be requested jointly by counsel for plaintiffs and defendants to authorize payment of the fund to a trustee or escrow agent, selected by plaintiffs' counsel, who shall invest that sum in obligations guaranteed by the full faith and credit of the United States in order to maximize the sum available for distribution.

7. In the event the settlement is not approved in all the cases specified in paragraph 1 or in the event the settlement cannot ultimately be effectuated, the settlement fund plus accumulated interest will be restored to HUD, less the costs of administration incurred to date. In either event the parties will consent to the reimposition of the existing judgments, stays, and preliminary injunctions, and restoration of the cases to the dockets of the courts where they are at the present time. Once the existing judgments, stays, and preliminary injunctions have been reimposed and the cases restored to the dockets of the courts where they are at the present time, the parties reserve the right to contest and seek to vacate or otherwise remove those judgments, stays, and preliminary injunctions.

8. The Stipulation of Settlement shall provide that the respective courts shall, if necessary, determine any issue or dispute relating to the settlement or to payment of claims. After distribution of the settlement fund has been completed, final judgments of dismissal will be entered in all cases resolved by this settlement.

9. The settlement fund shall be distributed to the recipients in the manner, and in the amounts, described below:

(a) *Formula* for *Selecting Recipients.* Every tenant who resided in a Section 236 project, including projects financed by state housing agencies, between February 1, 1975 and September 30, 1977, and who paid in excess of 30 percent of his or her adjusted monthly income (as defined in 24 C.F.R. § 236.2(a)(1) and (3)) for rent (25 percent in cases where direct tenant payment of one or more utility charges, except telephone, was approved by HUD), as of the last month of residence in the project, the last month before receiving a federal rental subsidy, or September 1977, whichever is earlier, will be eligible to receive retroactive tax and utility cost subsidy payments. The tenants eligible to share in the distribution of the settlement fund are those who satisfy the requirements of this subparagraph and who are members of the classes in cases specified in paragraph 1 or of a class in any other suit brought to compel payment of tax and utility cost subsidies who elect to participate in this settlement.

(b) *Amount of Payments.* Each eligible recipient as defined in paragraph 9 shall receive a lump sum payment equivalent to the number of months between February 1, 1975 and September 30, 1977, during which he or she resided in a Section 236 project without receiving an additional federal rental subsidy, multiplied by the tenant's monthly share of the actual increases in tax and utility costs for the period October 1, 1976 to September 30, 1977, over the initial operating expense level. The tenant's monthly share will be calculated by determining the actual increases in tax and utility costs over the initial operating expense level for each Section 236 project and dividing by twelve

months and by the number of residential units in each project.

(c) Tenants who have received the benefit of tax and utility cost subsidy payments pursuant to court order shall be entitled to receive the difference between the tax and utility cost subsidy payments already made on their behalf and the monthly tax and utility cost subsidy to be distributed under this plan.

(d) Where a project owner has been enjoined from collecting a HUD-approved rent increase, or has agreed not to collect such an increase by reason of specific litigation brought on behalf of tenants in that project to compel implementation of the tax and utility cost subsidy provisions of the Housing and Community Development Act of 1974, those sums owing to the eligible tenants of such project for those months in which a HUD-approved increase or a portion thereof was enjoined or forborne will be distributed to the project owner rather than the tenants in an amount not to exceed the portion of the rent increase attributable to increases in taxes and utility costs actually enjoined or forborne by the owner. Any amount owing to the tenant in excess of the amount actually enjoined or forborne by the project owner shall be paid to the tenant. HUD shall inform Section 236 project owners of their potential eligibility for tax and utility cost subsidy payments as a result of enjoined or forborne rent increases.

(e) In the event claims on the reserve fund exceed the amount in the fund as of September 30, 1977, plus whatever interest may accumulate prior to distribution of the fund, there will be a pro rata distribution of the fund among all eligible claimants, including project owners as defined in subparagraph (d), after costs of administration have been paid. If the claims made are insufficient to exhaust the fund, any funds which remain after all claims are paid shall be returned to the Secretary and

shall be credited to the reserve fund established by Section 236 of the National Housing Act, as amended.

(f) None of the sums distributed may be used to pay attorneys' fees.

10. Plaintiffs' counsel shall prepare and submit to the appropriate district courts a Stipulation of Settlement, containing all terms of their agreement, and providing in addition that notice of the proposed settlement be given to members of the plaintiff classes, subject to court approval.

(a) This preliminary notice will:
   1) inform tenants that if they lived in Section 236 housing for any period of time from February 1, 1975 through September 30, 1977 and paid in excess of 25 percent of their adjusted incomes for rent they may be eligible for a retroactive tax and utility cost subsidy payment,
   2) inform them that there will be a hearing on whether the settlement will be approved,
   3) state the date, time and place of the hearing,
   4) notify them of the procedure for filing objections,
   5) explain that if the settlement is approved a notice of settlement approval, if necessary, and claim form will be sent to tenants which must be filled out and submitted in order for the tenant to be paid his or her share of the settlement monies,
   6) explain that the tenant need not appear at the hearing in order in order to share in the settlement, and
   7) give the name, address and telephone number of the person to be contacted regarding questions about the proposed settlement.

(b) This preliminary notice will be prepared by, and contain the name of, lead counsel in each pending tax and utility cost subsidy case which is to be settled, and will be mailed with postage prepaid

by HUD to all Section 236 project owners. HUD will instruct project owners to post notices in the projects and to distribute to all tenants currently residing in the projects, and, where available, to provide forwarding addresses to plaintiffs' accounting firm for any tenants who have moved since February 1, 1975. HUD shall require project owners to certify to plaintiffs' accounting firm, within 15 days, that they have distributed and posted these notices. Plaintiffs' accounting firm will send notices to all former tenants for whom they have forwarding addresses.

(c) Plaintiffs' counsel shall cause a copy of the preliminary notice to be published in the newsletters of the Legal Services Corporation, the National Housing Law Project, and other publications directed to legal services attorneys and their clients. HUD shall announce the proposed settlement of these cases in a special press release and shall duplicate the preliminary notice in its Consumer Affairs Letter, HUD Newsletter, and HUD Challenge. Additional notice shall be undertaken if required by the respective courts in which the settling cases are pending, with costs to be paid from the settlement fund.

11. Final notice of settlement and distribution of claim forms shall be accomplished in the following manner.

(a) *Current and future tenants.* After approval of the settlement by the necessary courts, HUD shall require project owners to deliver or mail to each current tenant in a Section 236 project and to each applicant on the project owners' waiting lists for admission to the project, and post in three conspicuous places in each project, a notice of the final settlement and claim form. HUD shall require project owners to certify to plaintiffs' accounting firm that they have posted these notices at the

project and have given the notice and claim form to all current tenants and persons on their waiting lists. Names and addresses including apartment numbers of current tenants shall be provided to plaintiffs' accounting firm. Plaintiffs' accounting firm shall provide HUD with a list of all projects which have failed to certify compliance.

(b) *Former tenants.* To the extent such information is available, HUD shall require project owners to forward to the accounting firm employed by plaintiffs' counsel the name and last known address of any of their former tenants who lived in their projects from February 1, 1975 through September 30, 1977, for whom such information was not already provided. HUD shall require project owners to certify to plaintiffs' accounting firm that all available forwarding addresses have been sent to the firm, and the firm will send a notice and claim form to every tenant for whom it has received a forwarding address.

(c) Plaintiffs' counsel shall cause notice of the final settlement of this litigation to be published in the newsletters of the Legal Services Corporation, the National Housing Law Project and other publications directed to legal services attorneys and their clients. HUD shall duplicate the notice of settlement and claim form in its Consumer Affairs Letter, HUD Newsletter, and HUD Challenge. HUD shall also send to all Public Housing Authorities and to a manager or owner of all federally assisted housing projects a copy of the notice of settlement and claim form and request them to post the notice and claim form in three conspicuous places in each project. Additional notice shall be undertaken if required by the respective courts in which these settling cases are now pending, with costs to be paid from the settlement fund.

(d) If plaintiffs' accounting firm informs HUD that it has not received a certification from a project owner that the notice of settlement and claim form

has been posted and sent to all current tenants, HUD shall, for that project, promptly notify current tenants and post the notices and claim forms in three conspicuous places. If plaintiffs' accounting firm informs HUD that it has not received from a project owner a certification that the notice of settlement and claim form has been sent to all project applicants or that project owners failed to certify that a list of all available forwarding addresses of tenants who have moved out and a list of all current tenants has been provided, HUD shall promptly notify project owners that these submissions are required and shall take other appropriate and necessary action to assure compliance.

12. All notices and forms which are sent to tenants shall be printed in English on one side of the document and in Spanish on the reverse. All documents mailed to tenants shall be in envelopes marked "Important Notice—Please Forward," which shall be mailed with postage prepaid by HUD. Plaintiffs' accounting firm shall arrange for the printing of these forms and prepare them for distribution.

13. HUD shall reimburse the United States Postal Service for postage on all communications intended to aid in the implementation of this Settlement Agreement by arranging through the Postal Service for contractor use of a permit imprint. Once HUD has obtained authorization for the accounting firm to present official mail under the permit imprint, the accounting firm will be required to submit Postal Service Form 3602, "Statement of Mailing With Permit Imprints," whenever presenting mailings at the particular post office designated as point of entry in the Department's "Application for Contractor Use of Agency Official Mail" submitted to the Postal Service.

14. HUD shall also make a WATS line available for use by plaintiffs' counsel. All other costs of administration or out of pocket costs incurred by plaintiffs' counsel and

their accounting firm in connection with the distribution shall be paid from the settlement fund.

15. The mechanics of distribution of the settlement fund will be handled by the plaintiffs' accounting firm. After notices of the final settlement and claim forms have been sent to class members, they will have 60 days in which to submit those forms to the accounting firm. The firm will promptly review those forms for completeness and seek additional information from claimants on any incomplete claims. The firm will then promptly review all completed claims and notify all tenants of any claims or portions of claims which have been disallowed. Tenants will have 15 days after notification that a claim has been disallowed to contest that adverse determination by the accounting firm. After that time, the firm will make lump sum payments to all eligible recipients as set forth in paragraph 9 of this agreement. With each payment mailed to an eligible claimant there will be a notice explaining the amount of payment and how the amount was calculated. If a claim is rejected, the claimant will receive an explanation of reasons for rejections, such as that tenant income exceeded allowable limits.

III

16. HUD Central Office shall provide plaintiffs' accounting firm within a reasonable period of time with a list of every Section 236 project. That list shall include the following information on each project:

(a) project name;
(b) project address of record;
(c) HUD's identifying number and suffix;
(d) HUD region in which the project is located;
(e) number of rental units in the project;
(f) the date the project reached sustaining occupancy;
(g) the increase in tax and utility costs as of September 30, 1977, over the initial operating expense level for the project;

(h) indication as to whether the project is receiving either deep subsidy or rent supplement payments;
(i) the number or percentage of units under contract to receive a federal rental subsidy;
(j) the name, address, and telephone number of each project's manager or owner, if readily available in HUD files.

To the extent this information is not available in HUD Central Office, HUD Field Offices will be requested to send this data directly to the accounting firm. HUD will also notify all Field Offices to comply with all reasonable requests made by plaintiffs' accounting firm.

In addition, HUD Central Office shall provide to the accounting firm:
(l) a listing of HUD Regional and Field Offices, including addresses;
(m) a listing of HUD Section 236 projects for the elderly;
(n) the name and telephone number of HUD field personnel charged with overseeing Section 236 projects in a given Field Office; and
(o) a listing of all HUD projects whose tenants received the benefit of a tax and utility cost subsidy pursuant to court order including: the effective date of the court order and the amount of subsidy paid to the project by HUD on a monthly basis.

17. Any information supplied by HUD to the plaintiffs' accounting firm shall be used exclusively for the purpose of implementing the settlement of this litigation.

18. It is the intent of the Secretary of HUD and of the undersigned attorneys for tenants that any retroactive tax and utility cost subsidy payment which is made pursuant to this settlement agreement will have no effect whatsoever on any other need based governmental benefits to which the tenants are eligible or entitled. It is further agreed that

any payments made pursuant to this settlement agreement shall not be included as income, resources or assets under any HUD program where eligibility or continued eligibility is defined in terms of a family's or individual's income, resources or assets. The Secretary shall notify all HUD offices and project owners or managers of this provision and shall provide plaintiffs' counsel with a copy of such notification. HUD shall also notify the Department of Health, Education and Welfare and the Department of Agriculture of this settlement and urge that these Departments not treat any payments made under this settlement as income, resources or assets in determining eligibility for governmental benefits in any program administered by these Departments.

ENDNOTES

1. *Dubose v. Hills*, 22 F.R.Serv.2d 476, 478 (D.Conn.1976), *appeal pending on other grounds*, No. 76–6107 (2d Cir.).

2. Pub.L.No.93–383, 88 Stat. 633.

3. *See, e.g., Underwood v. Hills*, 414 F.Supp. 526 (D.D.C.1976), *appeal pending* Nos. 76–1603 and 76–1650 (D.C.Cir.), *stay granted sub nom. Harris v. Underwood*, 429 U.S. 892, 97 S.Ct. 250, 50 L.Ed.2d 175 (1976), *applic'n to vacate stay denied*, 434 U.S. 993, 98 S.Ct. 626, 54 L.Ed.2d 488 (1977); *Underwood v. Hills*, Nos. 76–1603 and 76–1650 (D.C.Cir. Dec. 1, 1978), unreported Order remanding the case to the District Court for consideration of the Settlement Agreement; *Ross v. Community Services, Inc.*, 396 F.Supp. 278 (D.Md.), *subsequent opinion*, 405 F.Supp. 831 (D.Md.1975), *aff'd mem.*, 544 F.2d 514 (4th Cir. 1976), *cert. granted sub nom. Harris v. Ross*, 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977), *remanded to District Court for consideration of settlement*, 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978); *Abrams v. Hills*, 415 F.Supp. 550 (C.D.Cal.), *aff'd*, 547 F.2d 1062 (9th Cir. 1976), *cert. granted sub nom. Harris v. Abrams*, 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977), *remanded to District Court for consideration of settlement*, 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978).

4. In October, 1975, temporary restraining orders were issued in each of those three cases. The Secretary was ordered to establish an initial operating expense level at each of the three projects. The orders also restrained her from refusing to pay an operating cost subsidy to the project owner on behalf of those tenants who were paying more than 30% of their adjusted family income for rent.

5. On June 28, 1976, this Court denied the Secretary of HUD a stay pending appeal. Similarly, on July 20, 1976, the Secretary's motion for a stay of relief was denied by the Second Circuit pending appeal.

6. H.R.Rep.No. 94–1362, 94th Cong., 2d Sess. (1976), 122 Cong.Rec.H. 7685.

7. This appeal was consolidated with the appeal taken by the Secretary from the May 27, 1976. Ruling on Plaintiffs' Motion to Amend Class Certification.

8. The nationwide class certified in *Underwood v. Harris* was expressly amended on June 8, 1976, by Judge Pratt to exclude the Connecticut statewide class.

9. For a more complete analysis of the revisions *see, Taylor v. Harris,* 452 F.Supp. 88 (D.Conn. 1978). Section 206 of the 1977 legislation has since been replaced by Section 201 of Pub.L. No. 95–557, 92 Stat. 2080, the Housing and Community Development Amendments of 1978, which is discussed *infra.*

10. The projects and tenants affected were those in *Dubose, Walter, Little, Adams* and *Pleasant.* The Stipulation provides that HUD will not seek reimbursement of any operating subsidies paid after September 30, 1977, from any tenant or project owner.

11. *Harris v. Ross,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977); *Harris v. Abrams,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977).

12. *See, Ross v. Community Services, Inc.,* 396 F.Supp. 278 (D.Md.1975). 405 F.Supp. 831 (D.Md.1975) *aff'd mem.* 544 F.2d 514 (4th Cir. 1976); *Harrison v. Hills,* CV No. 74–938 (W.D. Pa.1975); *Campbell v. United States Dept. of Housing & Urban Development,* CV No. 75–471 (N.D.Ohio 1975); *Abrams v. Hills,* 415 F.Supp. 550 (C.D.Cal.1975), *aff'd* 547 F.2d 1062 (9th Cir. 1976); *Parker Square Tenants Ass'n v. The Dept. of Housing & Urban Development,* CV No. 76–521–F (D.Mass.1976); *Gertsch v. Hills,* 414 F.Supp. 15 (D.Utah 1976); *Sicuro v. Hills,* 415 F.Supp. 553 (C.D.Cal.1976), *appeal pending,* No. 76–2872 (9th Cir.); *Battles Farm v. Hills,* 414 F.Supp. 521 (D.D.C.1976), *appeal pending,* No. 76–1641 (D.C.Cir.); *Underwood v. Hills,* 414 F.Supp. 526 (D.D.C.1976), appeals pending Nos. 76–1603 and 76–1650 (D.C.Cir.). *See Also, Dussault v. Hills,* CV No. 76–147 (D.N.H. May 23, 1976); *Gibson v. Harris,* 438 F.Supp. 487 (E.D.Va.1977); Haas v. Harris, 436 F.Supp. 279 (D.R.I.1977), *rev'd sub nom. Haas v. Howard,* 579 F.2d 654 (1st Cir. 1978); *Lefort v. Hills,* No. 76–0286 (D.R.I. Nov. 19, 1976).

13. The Settlement Agreement superceded the Memorandum of Understanding for Settlement of Operating Subsidy Litigation, dated January 24, 1978.

14. On the same date this Court granted plaintiff's Motion to Further Amend Class Certification. As recertified the statewide classes were composed of:

> All persons who now reside, or have in the past resided, in housing projects in Connecticut federally subsidized pursuant to Section 236

who between February 1, 1975 and September 30, 1977 were paying more than 30% of their "adjusted family income" for rent (25% in those projects in which direct tenant payment of one or more utility charges, except telephone, was approved by HUD), and who were paying during that period for increased property taxes and utilities above the initial operating expense level established for their project which should have been paid for by HUD through tax and utility cost subsidies pursuant to Section 212 of the Housing and Community Development Act of 1974, 12 U.S.C. § 1715z-1(f)(3) and (g).

The statewide Section 236 project owner class consists of 105 such projects.

15. Affidavits were filed by plaintiffs' counsel and by the accounting firm ordered to give notice of the proposed settlement to the statewide classes. *See,* Declaration of James C. Studevant Regarding Compliance By Him With The Notice Requirements Prescribed By This Court's Order For Hearing On Settlement; Declaration of Peter B. Frank Regarding Compliance By Price Waterhouse & Co. With The Court's Order For Hearing On Settlement.

16. Two written documents entitled "Amicus Briefs" were filed prior to the hearing and are discussed *infra.*

17. On October 1, 1977, the revised operating subsidy program provided for in Section 206 of Pub.L.No.95–128, the Housing and Community Development Act of 1977, became effective. *See, Taylor v. Harris,* 452 F.Supp. 88 (D.Conn. 1978).

18. Paragraph 3a of the Stipulation provides in full:

Formula for Selecting Eligible Recipients:

Every tenant who resided in a Section 236 project, including projects financed by state housing agencies, between February 1, 1975 and September 30, 1977, and who paid in excess of 30 percent of his or her adjusted monthly income (as defined in 24 C.F.R. § 236.2(a)(1) and (3)) for rent (25 percent in cases where direct tenant payment of one or more utility charges, except telephone, was approved by HUD), as of the last month of residence in the project, the last month before receiving a federal rental subsidy, or September, 1977, whichever is earlier, will be eligible to receive retroactive tax and utility cost subsidy payments under this settlement. The tenants eligible to share in the distribution of the settlement fund are those who satisfy the requirements of this paragraph 3a and who are members of the class certified in these actions, of the classes in cases specified in paragraph 1, or of a class in any other suit brought to compel payment of tax and utility cost subsidies pursuant to 12 U.S.C. § 1715z-1 who elect to participate in this settlement.

19. Paragraph 3b of the Stipulation provides in full:

Amount of Payments

Each eligible recipient, as defined in paragraph 3a, shall receive a lump sum payment equivalent to the number of months between

February 1, 1975 and September 30, 1977, during which he or she resided in a Section 236 project without receiving an additional federal rental subsidy, multiplied by the tenant's monthly share of the actual increases in tax and utility costs as of September 30, 1977 at that Section 236 project. A tenant's monthly share will be calculated by determining the amount by which tax and utility costs for the period October 1, 1976 to September 30, 1977 exceed the initial operating expense level established for that Section 236 project and by then dividing that amount by twelve months and by the number of residential units in that project.

20. Paragraph 3d of the Stipulation provides in full:

> Where a project owner has been enjoined from collecting a HUD-approved rent increase, or has agreed not to collect such an increase by reason of specific litigation brought on behalf of tenants in that project to compel implementation of the tax and utility cost subsidy provisions of the Housing and Community Development Act of 1974, those sums owing to the eligible tenants of such project for those months in which a HUD-approved increase or a portion thereof was enjoined or forborne will be distributed to the project owner rather than the tenants in an amount not to exceed the portion of the rent increase attributable to increases in taxes and utility costs actually enjoined or forborne by the owner. Any amount owing to the tenant in excess of the amount actually enjoined or forborne by the project owner shall be paid to the tenant. HUD shall inform Section 236 project owners of their potential eligibility for tax and utility cost subsidy payments as a result of enjoined or forborne rent increases.

21. *See*, paragraph 3c of the Stipulation for Settlement.

22. *See* paragraph 3e of the Stipulation for Settlement.

23. *Underwood, Ross* and *Abrams, supra*.

24. *See*, Stipulation for Settlement, para. 6.

25. *Id.*, para. 5.

26. *Id.*, para. 4d.

27. *See*,. Pub.L. No.95–128, Section 206(a); Pub. L.No.95–557, Section 201(i)(C).

28. By Order of Judge Pratt in *Underwood, supra*, filed on January 3, 1979, the settlement sum was transferred to Crocker National Bank on January 11, 1979. The Court is informed that the daily interest on the sum exceeds $15,000.00.

29. Indeed, as both the plaintiffs and the Secretary assert, the passage of time and the inadequacy of the records maintained by HUD and the project owners makes it impossible in 1979 to determine with precision every tenant's rent/income ratio for each month between February 1, 1975 and September 30, 1977. *See*, plaintiffs' memorandum of Law in Support of The Proposed Stipulation for Settlement, at 10–11; Declaration of James C. Sturdevant in Support of Settlement, at 13, para. 12; Federal Defendants' Memorandum of Law in Response to *Amicus* Memoranda, at 2.

30. Price Waterhouse's preliminary estimates indicate that the cost of its making the distribution would be approximately $2.2 million, while HUD estimated that if it, rather than Price Waterhouse, implemented the operating subsidy program, its administrative costs would be much higher. The estimate of those costs to HUD was given as in excess of $10 million in the Declaration of Fred. W. Pfaender filed in support of the government's application for a stay in the United States Supreme Court in *Underwood, supra*. Further, since HUD could not invest the reserve fund and earn interest, while under the proposed settlement that fund has been invested by an investment agent since January 11, 1979, the settlement will result in a substantial increase in the total amount of money available for payment of subsidies.

31. *See,* Plaintiffs' Memorandum of Law in Opposition to Motion To File Memorandum as *Amicus Curiae* of the National association of Housing Managers and Owners, at 3; Plaintiffs' Memorandum of Law in Support of the Proposed Stipulation for Settlement, at 14.

32. As plaintiffs have indicated other than the filing of written appearances by counsel, none of the named Section 236 project owners in these cases nor any member of their statewide class have filed any documents in these cases or any objection to the proposed settlement. Plaintiffs' Memorandum of Law in Opposition to Motion to File Memorandum as *Amicus Curiae* of NAHMO, at 2.

33. It should be noted that new counsel for the statewide plaintiff class certified in *Taylor, supra,* has informed the Court that in his opinion there is no legal basis for his clients to oppose the proposed settlement. *See,* letter of Louis I. Parley to this Court dated January 22, 1979, attached as Exhibit B to Plaintiffs' Memorandum of Law in Opposition to Motion to File Memorandum as *Amicus Curiae* of NAHMO.

34. Despite having received a copy of the Settlement Agreement, no Section 236 project owner filed an objection with this Court by January 15, 1979, the deadline imposed by this Court for the filing of objections. *See,* Declaration of Peter B. Frank Regarding Compliance By Price Waterhouse & Co. With The Court's Order For Hearing on Settlement, at 1, para. 4 and 2, para. 7.

35. The Conference Report to Section 206 of the 1977 Act provides:

> The conferees intend that these amendments shall not prejudice the rights or liabilities of any party presently before the courts seeking operating subsidy payments pursuant to sections 236(f)(3) and 236(g). H.R. Conf. Rep.No.95–634, 95th Cong. 1st Sess. 63, rptd. at U.S.Code Cong. & Admin.News, pp. 2965, 2983 (1977).

The Court interprets the following sentence in the Report—". . . relief awarded shall be used by the project owner solely to effect a reduction in the basic rental charges . . ."—to simply require project owners who do receive subsidy payments pursuant to the 1977 Act to use that money for the benefit of tenants, the primary intended beneficiaries of the 1977 Act.

Moreover, as the Secretary has pointed out in her Brief, at 4, the legislative history to Section 201 of Pub.L.No.95–557, the Housing and Community Development Amendments of 1978, contains similar language. The Conference Report accompanying that legislation provides as follows:

> The conference report contains the House provision amended such that only funds credited to the Section 236 reserve fund after October 1, 1978, would be limited to use in the program authorized by this section. The conferees adopted this amendment so as to not prejudice the pending dispute between the Department and a class of tenants over the previous lack of use of the Section 236 tax and utility subsidy program. Should a disposition of the dispute be made which leaves unobligated funds in the Section 236 reserve fund, the conferees expect that legislative action will be taken to make such funds available for the program authorized by this section. H.R.Conf. Rep. No.95–1792, 95th Cong.2d Sess. 65, rptd. at U.S.Code Cong. & Admin.News, pp. 6368, 6651 (1978).

36. *See,* Proposal of Price Waterhouse & Co. to Conduct A Settlement Distribution in Connection with *Underwood v. Hills* and *Dubose v. Hills,* dated August 9, 1978, and letter from Price Waterhouse & Co. to Ms. Patricia M. Tenoso, dated September 6, 1978, both of which have been filed in *Dubose v. Harris,* Civil No. H–75–303 (D.Conn.).

37. *See, Dubose v. Harris,* Transcript of Proceedings on Settlement held on January 29, 1979, at 5.

38. *See,* Rules of Counsel attached as Exhibit D to Declaration of Patricia M. Tenoso in Support of Settlement filed in *Underwood, supra,* which were attached as Exhibits to Plaintiffs' Memorandum in Opposition to Motion for Permission to File Amicus Brief: Declaration of Catherine M. Bishop filed in these cases.

I. The plaintiffs in these actions have moved this Court to amend its Class Certification Ruling filed on May 27, 1976, so as to conform the class definition to the class of tenants eligible for operating subsidy payments as set forth in paragraph 9 of the Settlement Agreement attached hereto.

2. The terms and conditions are taken from the provisions of the Settlement Agreement executed by counsel for the respective parties dated September 26, 1978 and October 13, 1978 (a copy of which is attached hereto).

1. In the event of a conflict between the Settlement Agreement and the Memorandum of Understanding the provisions of this document will govern.

Dated September 26, 1978

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Vernice DUBOSE et al.

v.

Patricia Roberts HARRIS et al.

Claudia WALTER et al.

v.

Patricia Roberts HARRIS et al.

Janette LITTLE et al.

v.

Patricia Roberts HARRIS et al.

Civ. Nos. H–75–303, H–75–345, H–75–346.

United States District Court,

D. Connecticut.

May 9, 1977.

In three consolidated lawsuits wherein low-income residents of federally subsidized housing projects sought to compel the Department of Housing and Urban Development to implement an operating cost subsidy program, the residents moved for contempt, claiming that HUD was not making operating cost subsidy payments as required by a previous court order. The District Court, Blumenfeld, J., held that: (1) because the preliminary injunction had not been subsumed in relief subsequently ordered in connection with a motion to amend class certification, the Department remained bound by the preliminary injunction requiring the payment of operating cost subsidies, and (2) the circumstances did not establish such bad faith or willful purpose to disobey court orders as to warrant holding defendants in contempt.

Ordered in accordance with opinion.

See also, D.C., 405 F.Supp. 1277.

Dennis J. O'Brien, Norman K. Janes, Tolland-Windham Legal Assistance Program, Willimantic, Conn., for plaintiffs in No. H–75–303.

John A. Dziamba, Tolland-Windham Legal Assistance, Willimantic, Conn., James C. Sturdevant, Tolland-Windham Legal Assistance, Rockville, Conn., for plaintiffs in No. H–75–345.

Joan Pilver, Raymond Norko, Neighborhood Legal Services, Hartford, Conn., for plaintiffs in No. H–75–346.

Peter Dorsey, U.S. Atty., New Haven, Conn., Maryann Clifford, Dept. of Justice, Civ. Div., Robert S. Greenspan, Richard C. Livermore, U.S. Dept. of HUD, Washington, D.C., for defendants in all cases.

Rolland Castleman, West Hartford, Conn., Paul Michel, U.S. Dept. of Justice, Washington, D.C., for defendants in No. H–75–303.

Guy DeFrances, Meriden, Conn., for defendants in No. H–75–345.

James H. Shulman, Ribicoff & Kotkin, Hartford, Conn., for defendants in No. H–75–346.

RULING ON MOTION FOR CONTEMPT

BLUMENFELD, District Judge.

These three lawsuits, consolidated for trial, concern the refusal of the Department of Housing and Urban Development ("HUD") and its Secretary to implement an operating cost subsidy program, enacted as Section 212 of the Housing and Community Development Act of 1974, 12 U.S.C. § 1715z–1(f)(3) and (g). On December 15, 1975, this court entered a preliminary injunction ordering the implementation of the program at three federally subsidized projects. 405 F.Supp. 1277 (D.Conn.1975). Plaintiffs now move for contempt, claiming that HUD is not making operating cost subsidy payments as required by the December 15, 1975 order. Defendants counter that in light of a stay issued on February 10, 1977 by the Court of Appeals for the Second Circuit, they are in full compliance with the orders of this court.

I.

Resolution of the present motion necessitates a brief review of the procedural history of these actions. The named plaintiffs in each of these consolidated actions are low-income residents of federally subsidized housing projects in Connecticut. While each action involves a different housing project, the cases present the common question of the legality of HUD's refusal to implement the operating cost subsidy program.

1. In October 1975, temporary restraining orders were issued in each of the cases. Defendants were ordered to establish an initial operating expense level at each of the three projects. The orders also restrained defendants from refusing to pay an operating cost subsidy on behalf of tenants of the projects who were paying more than 30% of their adjusted family income for rent.

2. On December 15, 1975, this court issued a preliminary injunction ordering the same relief as the October temporary restraining orders. In addition, it was determined that class action treatment was appropriate in each of the three cases. Class certification was by project:

> "The plaintiff classes certified consist of those family units now residing, or who may at some future time reside, at one of the three Section 236 housing projects involved in this lawsuit who pay or will pay more than 30% of their 'adjusted family income' for rent as of the effective dates of the rent increases challenged here."

405 F.Supp. at 1280.

The injunction required the payment of operating cost subsidies coterminous with the effective date of rent increases at the three projects: October 1, 1975 for the project involved in *Dubose*, November 1, 1975 for the projects involved in *Walter* and *Little*.

Defendants did not appeal this December 15, 1975 preliminary injunction.

3. In the months following the December 15 preliminary injunction, six more suits were filed in this district. In each case, preliminary injunctions were issued.

4. On May 27, 1976, this court ruled upon plaintiffs' motion to amend class certification. Plaintiffs sought to expand the individual classes certified by project into a statewide class. "In view of the Secretary's continued refusal to implement the operating cost subsidy program for all Section 236 projects, and the multiplicity of litigation on this issue now developing in the District of Connecticut, the motion to recertify the class [was] granted." May 27, 1976 Ruling, at 3. The recertified class is

> "comprised of all persons who now reside, or may at some future time reside, at one of the 101 housing projects in Connecticut eligible to receive an interest subsidy under Section 236 at which there has been a rent increase and who pay or will pay more than 30% of their 'adjusted family income' for rent as of the date the basic monthly rent was determined for each project."

May 27, 1976 Ruling at 5 (footnote omitted).

Recognizing that the "same relief [was] necessary to enforce the existing preliminary injunction with respect to the remaining Section 236 projects," HUD was enjoined from refusing to pay subsidies "to each project owner, [now part of the certified class] commencing with the rental payments due June 1, 1976, or the effective date of the rent increases, whichever is later." May 27, 1976 Ruling at 6 (footnote omitted).

5. This May 27, 1976 ruling was appealed to the Court of Appeals for the Second Circuit.

6. On June 28, 1976, this court denied defendants a stay pending appeal.

7. On July 20, 1976, the Second Circuit denied defendants a stay pending appeal.

8. On September 27, 1976, this court denied defendants' motion to dissolve the May 27, 1976 preliminary injunction.

9. Defendants appealed the September 27, 1976 ruling, and that appeal has been consolidated with the appeal from the May 27, 1976 ruling.

10. On October 18, 1976, the Supreme Court issued a stay in *Underwood v. Harris,* 429 U.S. 892, 97 S.Ct. 250, 50 L.Ed.2d 175 (1976), *staying* 414 F.Supp. 526 (D.D.C. 1976), *appeal pending* Nos. 76–1603, 76–1650, a national class action challenge to HUD's failure to implement the operating cost subsidy program.[1]

11. Relying on the Supreme Court's stay in *Underwood,* defendants renewed their motion to the Second Circuit for a stay pending appeal of the May 27, 1976 and September 27, 1976 rulings. On December 27, 1976, the Second Circuit granted that stay.

12. On February 10, 1977, the Director of the Hartford Area Office of HUD issued a mailgram to all Section 236 project owners in Connecticut, including the three project owners in the instant cases, informing them that as a result of the stay issued by the Second Circuit, no operating cost subsidies would be paid after January 31, 1977.

13. On March 7, 1977, plaintiffs filed the present motion for contempt.

II.

Plaintiffs argue that the termination of subsidy payments to the three projects is contemptuous of the December 15, 1975 preliminary injunction. The crux of their position is that the Second Circuit's stay could not affect the relief granted to them because the December 15, 1975 preliminary injunction was never appealed. Defendants respond that the May 27, 1976 order, which has been appealed, subsumed

all previous orders of this court. Hence, they contend that the stay of that ruling applies to the relief granted to the instant plaintiffs. In essence, the question is whether the May 27, 1976 conversion and expansion of the individual classes certified by project into one statewide class served to merge all earlier relief and reopen and render appealable previously final orders for which the time for appeal had expired.

A.

[1, 2] The class action is a significant tool of judicial administration. Its purpose is to enable representative parties to litigate in a single lawsuit legal questions common to a class of persons. In this way, the class action eliminates the possibility of repetitious actions. While this management device brings under the umbrella of a single lawsuit a large number of individual claims all of which present a common legal question, it does not eliminate each class member's individual cause of action. This distinction between common legal questions which make class action status desirable and the continued presence of individual causes of action is critical to the resolution of the present motion.

[3] The common legal question involved in this litigation is the proper construction of HUD's duty under Section 212 of the Housing and Community Development Act of 1974. However, the individual causes of action of the tenants at the various Section 236 projects, which were triggered by HUD's approval of rent increases, have arisen at different points in time. It is for this reason that the preliminary relief granted on behalf of the initial three projects on December 15, 1975, was not subsumed in the relief granted to newly added class members on May 27, 1976.

This analysis is reflected in this court's May 27, 1976 ruling. Because of the multiplicity of litigation on the same

issue that was developing in this district, plaintiffs' motion to convert the individual classes certified by project into one statewide class was granted. However, the rent increases and hence the causes of action of the tenants of the newly added projects did not arise until after the issuance of the December 15, 1975 preliminary injunction. As such, it was recognized that additional preliminary relief was necessary to confer the benefits of the *existing* preliminary injunctive relief on the tenants of the newly added projects. To this end, a *second* preliminary injunction was issued enjoining HUD from refusing to pay operating cost subsidies to each newly added project owner.

That the May 27, 1976 injunctive relief did not subsume the earlier December 15, 1975 preliminary injunction is conclusively revealed by the fact that the later injunction ordered HUD to make the subsidy payments "commencing with the rental payments due June 1, 1976, or the effective date of the rent increase, whichever is later." May 27, 1976 Ruling at 6. However, the relief initially ordered in December 1975 required the payment of operating subsidies coterminous with the effective date of the rental increases at the initial three projects, that is, October 1, 1975 and November 1, 1975. Clearly, it was not this court's intention to supplant this earlier relief by requiring that subsidies paid to these three project owners be legally required only as of June 1, 1976.

We are dealing here with preliminary relief pending the final determination on the merits. The class action device allows for a single final order with full res judicata effect. However, at this preliminary stage, because some claims arose after the issuance of the December 15, 1975 preliminary injunction, the issuance of separate and distinct preliminary injunctions has been necessary. Consequently, as of June 1, 1976, two separate and distinct preliminary injunctions were in effect; one dated December 15, 1975, and one dated May 27, 1976.

B.

[4] A preliminary injunction is an appealable order under 28 U.S.C. § 1292(a). Thus, defendants could have appealed the December 15, 1975 preliminary injunction to the Second Circuit, and they could have sought a stay of that order pending the appeal. However, defendants chose not to follow that course. While they have appealed the May 27, 1976 ruling, that appeal does not reopen the previously final December 15, 1975 order for which the time for appeal had run. 7 *Moore's Federal Practice* ¶ 110.20[2], at 238–39 (1975).

[5, 6] An interlocutory appeal carries with it all previous orders and rulings only to the extent that they are subsumed into the appealed ruling. *United States v. Fort Sill Apache Tribe of the State of Oklahoma*, 507 F.2d 861, 864, 205 Ct.Cl. 805 (1974). As previously analyzed, the December 15, 1975 preliminary injunction was not subsumed in the relief ordered on May 27, 1976. Of course, "[i]f no stay has been obtained, an injunction that the district court has granted remains in effect." Wright and Miller, *Federal Practice and Procedure:* Civil § 2904, at 314 (1973). Therefore, defendants remain bound to obey the December 15, 1975 preliminary injunction, and the termination of subsidy payments to the three projects is in non-compliance of that order.

III.

[7, 8] There remains only the question of what relief is appropriate in light of the defendants' non-compliance. Surely, defendants had doubts about the scope of the Second Circuit's stay and the continuing effect of the December 15, 1975 preliminary injunction. However, the proper way to raise those questions is by a motion for clarification or a motion for modification.[2] Defendants were not free to act before taking the proper steps to resolve their doubts. *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *United States v. Partin*, 524 F.2d

992, 999 (5th Cir. 1975). Accordingly, it would be within this court's discretion to hold defendants in contempt. *Class v. Norton,* 507 F.2d 1058, 1060 (2d Cir. 1974).

[9] Nevertheless, I am not convinced that defendants acted in bad faith or out of a willful purpose to disobey the orders of this court. There were ambiguities in the situation confronting them. Therefore, I do not grant plaintiffs' motion for contempt. Rather, I trust that this opinion is sufficient to clarify defendants' duty to obey the December 15, 1975 preliminary injunction and to make the operating cost subsidy payments to the three projects involved in the instant actions.

Plaintiffs' motion for contempt is denied; but defendants are required to comply with the December 15, 1975 preliminary injunction issued by this court.

SO ORDERED.

ENDNOTES

1. The nationwide class involved in *Underwood v. Harris* has been amended to exclude the Connecticut statewide class.

footnote ms. page 231

2. In their Memorandum in Opposition, defendants argue that if this court concludes, as it has, that the projects in *Dubose, Little* and *Walter* are outside the scope of the May 27, 1976 preliminary injunction, then it should issue a stay of the relief granted in these cases. However, defendants have made no formal motion for a stay or for modification. While the court has power to *sua sponte* modify its own injunction, *McDowell v. Celebrezze,* 310 F.2d 43 (5th Cir. 1962), this is not an appropriate case in which to do so. There are important questions which need to be argued and briefed before such a motion could be ruled upon.

DUBOSE v. HILLS

AND TWO OTHER CASES

US Dist Ct, D Conn, May 27, 1976
22 FR Serv2d 476

Where three lawsuits challenging the Department of Housing and Urban Development's refusal to implement an operating cost subsidy program enacted as Section 212 of the Housing and Community Development Act of 1974 had been certified as class actions on behalf of those family units residing at the plaintiffs' housing projects, and a preliminary injunction had been entered requiring HUD to implement the operating cost subsidy program for those projects, in view of the fact that HUD was implementing the program only for those projects and not for the others within the state, and since numerous other suits had been brought in the state to challenge HUD's inaction, the individual classes certified by project would be expanded into a statewide class, and the other actions pending before the court would be consolidated for trial. The only issue was as to the proper construction of the Act, the class was sufficiently numerous, and plaintiffs' counsel would adequately represent the statewide class. Insofar as the defendant owners of the housing projects were mere "bystanders," in that they would receive the increased rent charges from either the plaintiffs or from HUD, a statewide defendant class of project owners would be adequately represented by counsel for the named defendant project owners. Each project owner would be notified and given an opportunity to appear with counsel.

BLUMENFELD, District Judge. These lawsuits, consolidated for trial, challenge Carla Hills' and the Department of Housing and Urban Development's refusal to implement an operating cost subsidy program[1] enacted as Section 212 of the Housing and Community Development Act of 1974.[2] This court issued a temporary restraining order, postponing implementation of the rent increases, in

each of the three cases. On December 15, 1975, a preliminary injunction was entered, based on this court's conclusion that the plaintiffs were likely to prevail on the merits, and would suffer irreparable injury if the subsidy program were not implemented immediately.[3]

Each of these cases was brought as a class action, and the classes have been certified as "those family units now residing, or who may at some future time reside, at one of the three Section 236 housing projects involved in this lawsuit who pay or will pay more than 30% of their 'adjusted family income' for rent . . ."[4] Since my ruling in December, six more such suits have been filed in this District, four of which are now pending before me.[5] Only after the filing of these suits, and this court's issuance of temporary restraining orders and preliminary injunctions, did the Secretary begin to implement the operating cost subsidy program for those projects.

The plaintiffs now seek to expand the class, converting the individual classes certified by project into a statewide class. In view of the Secretary's continued refusal to implement the operating cost subsidy program for all Section 236 projects, and the multiplicity of litigation on this issue now developing in the District of Connecticut, the motion to recertify the class is granted.

The court has been informed by counsel for the government that there are 118 projects in the State of Connecticut which now receive interest sudsidies under Section 236, have HUD/FHA insured mortgages, and have been finally endorsed.[6] One hundred of these have had at least one rent increase approved by HUD, or now have one pending. The court was notified on May 21, 1976, of eleven additional projects, eligible for assistance under Section 236, which either have not yet been finally endorsed or are not federally insured. Only one of these projects has had a rent increase.[7] The court has also learned that Judge Pratt has recently certified a national class, the precise contours of which remain to be defined, in Underwood v. Hills, Civil No. 76–0469 (DDC).

The requirements of Rule 23 are clearly met here. The members of the proposed class are certainly numerous, and the legal issue presented is identical—the proper construction of the 1974 amendments to Section 236. The claims of both plaintiffs and defendants in these three cases are typical of those available to the entire class, and I find that the plaintiffs' counsel will without question adequately protect the interests of the plantiff class.

As to the project owners, however, the representation requirement presents somewhat more difficulty. This court has no doubt as to the ability or zeal with which counsel for the owners of the three projects involved in these cases have protected their clients' interests. But they have not undertaken to represent the owners of all Section 236 projects in the State of Connecticut, and have not indicated to the court their willingness to do so. With respect to the construction of the operating subsidy provisions of Section 236, however, the private defendants are really mere bystanders; the true conflict is between the plaintiffs and HUD. The project owners will not "lose" whichever way the court interprets the statute, because they will either collect the increased rent from the tenants or receive a subsidy check from HUD. Since the statewide class certification is only with respect to the statutory issue, pursuant to Rule 23(b)(2) and (c)(4), I find that the project owners' interests can be adequately protected by the presence of counsel for the 236 projects named as defendants here. Ultimately, this will be each defendant's choice, since each will have the option, after receiving notice,[8] of appearing with counsel of his choice.

Accordingly, two classes may be certified with respect to the plaintiffs' statutory claims. The plaintiff class will be comprised of all persons who now reside, or may at some future time reside, at one of the 101 housing projects in Connecticut eligible to receive an interest subsidy under Section 236 at which there has been a rent increase[9] and who pay or will pay more than 30% of their "adjusted family

income" for rent as of the date the basic monthly rent was determined for each project. The private defendant class consists of the owners of the 101 Section 236 projects listed in Exhibit A. These classes may be supplemented if other project owners apply for and are granted rent increases. Those cases already filed and pending before me, listed in note 5 supra, are hereby consolidated with these three cases for trial purposes. Rule 42(a) Fed R Civ P.

The posture of the pending cases has necessarily been altered by this certification of the statewide classes. The temporary restraining orders and preliminary injunctions already issued in the consolidated cases directed the Secretary to determine those projects' initial operating expense levels, and the portion of their rent increases attributable to rises in taxes and utilities, as set forth in subsection (f)(3) of Section 236. This same relief is necessary to enforce the existing preliminary injunction with respect to the remaining Section 236 projects.

The Secretary is hereby ordered to make those calculations for the projects now part of the certified class. After those determinations are made, HUD and the private defendants must compute the total operating cost subsidy available to each project, based on a 30% income figure for each tenant. Once these per tenant subsidy figures have been calculated, the Secretary must make the statutorily required findings as to the reasonableness of the rent increases and the amount in the reserve fund, if proper, as required by my earlier order. Finally, HUD is enjoined from refusing to pay those subsidies to each project owner, commencing with the rental payments due June 1, 1976, or the effective date of the rent increase, whichever is later.[10] HUD is directed to make these determinations and the subsidy payments as rapidly as possible, but in no event later than July 1, 1976. After HUD makes those payments, the private defendants must reimburse their tenants in the amount of the subsidy credited to each tenant.

This order may be modified on motion of any party for good cause shown. It is

So ordered.

ENDNOTES

1. The suits also challenge the rent increases themselves, on due process grounds. Approval for the rent increases was obtained from HUD by the private defendants, owners of the Section 236 housing projects. The due process claims are not being pressed at the present time.

2. Public Law 93–383. This section amended Section 236 of the National Housing Act, 12 USC § 1715z–1 (Supp. IV, 1974) amending 12 USC § 1715z–1 (1970).

3. Dubose v. Hills, 405 F.Supp. 1277 (D.Conn.1975).

4. Id., 405 F.Supp. at 1280.

5. Pleasant v. Hills, Civil No. H 76–26; Morales v. Hills, Civil No. N 76–44; Adams v. Hills, Civil No. H 76–89; and Grundman v. Hills, Civil No. H 76–160. Johnson v. Hills, Civil No. N 76–109, is pending before Judge Newman. A ninth case, Mendez v. Hills, Civil No. H 76–168, was filed and then withdrawn in April.

6. Letter from Assistant United States Attorney Raymond L. Sweigart to the court, May 5, 1976.

7. Letter from Assistant United States Attorney Raymond L. Sweigart to the court, May 19, 1976.

8. Counsel for the plaintiffs agreed to accept responsibility for notice to the private defendants in the expanded class at the hearing on March 29, 1976. This notice should consist of the amended complaint and answer in Dubose v. Hills, Civil No. H 75–303, and a copy of this order. Notice should be served by June 10, 1976.

9. Attached as Exhibit A to this Order.

Vernice DUBOSE, et al.

v.

Carla HILLS et al.

Claudia WALTER et al.

v.

Carla HILLS, et al.

Janette LITTLE et al.

v.

Carla HILLS et al.

Civ. Nos. H–75-303, H–75-345, H–75-346.

United States District Court,

D. Connecticut.

Sept. 27, 1976

Low-income residents of a federally subsidized housing project obtained injunctive relief to require implementation of an "operating cost subsidy" program established by the Housing and Community Development Act of 1974, 405 F. Supp. 1277. On motion by defendants to vacate the order and dissolve the preliminary injunction, the District Court, Blumenfeld, J., held that in the 1976 amendment, language stating that the reserve fund shall be available "for the payments on contracts entered into pursuant to the authorities enumerated above" does not indicate that the reserve fund can only be spent pursuant to contract authority, and the 1976 amendment furnished no basis for altering the holding that the Secretary of the Department of Housing and Urban Development was under a mandatory duty to implement the operating cost subsidy program.

Preliminary injunction modified to authorize use of funds for other purposes after effective date of amendment; motion denied.

Dennis J. O'Brien, Norman K. Janes, Willimantic, Conn., for Vernice Dubose et al.

John A. Dziamba, Willimantic, Conn., James C. Sturdevant, Rockville, Conn., for Claudia Walter et al.

Joan E. Pilver, Raymond Norko, Hartford, Conn., for Janette Little et al.

Peter Dorsey, U.S. Atty., Raymond Sweigart, Asst. U.S. Atty., New Haven, Conn., Robert Greenspan, Richard C. Livermore, Dept. of HUD, Washington, D.C., Rolland Castleman, West Hartford, Conn., Paul Michael, Civ. Div., Dept. of Justice, Washington, D.C., Guy DeFrances, Meriden, Conn., James H. Shulman, Hartford, Conn., for Carla Hills et al.

RULING ON MOTION TO VACATE ORDER AND DISSOLVE PRELIMINARY INJUNCTION

BLUMENFELD, District Judge.

These lawsuits, consolidated for trial, concern the refusal of the Department of Housing and Urban Development ("HUD") and its Secretary, Carla Hills, to implement an operating cost subsidy program, enacted as Section 212 of the Housing and Community Development Act of 1974.[1] On December 15, 1975, this court entered a preliminary injunction ordering the implementation of the program.[2] On May 27, 1976, the December order was expanded by a ruling converting plaintiffs' original individual classes, which were certified by project, into a statewide class.[3] The original compliance date of June 1, 1976, has been extended until September 15, 1976, by several orders of this court.

On August 9, 1976, Congress enacted the "Housing and Urban Development and Independent Agencies Appropriation Act," Public Law 94–378.[4] Arguing that the proviso contained in this legislation sheds new light on the issues in this case, the defendants now move to vacate the December and May orders and to dissolve the preliminary injunction. Oral argument was heard on this motion on September 13, 1976.

The Section 236 operating subsidies program is established by 12 U.S.C. § 1715z–1(f)(3) (1970) (Supp. IV).[5] A source of funds for these operating subsidies is provided by subsection (g) of the same statute which establishes a "reserve fund" comprised of "excess rentals" collected by the Section 236 project owners.[6] The central issue throughout this litigation has been the nature and scope of the Secretary's discretion with respect to the implementation of the operating subsidies program and the expenditure of the reserve fund. The issuance of the preliminary injunction was premised upon this court's conclusion that the implementation of the program and the expenditure of the reserve fund for operating subsidies was mandated by the statute.

The defendants now contend that Public Law 94–378 affects my earlier determinations in two ways. First, they argue that this statute "makes it plain that contract authority is required before any of the amounts contained in the reserve fund may be utilized."[7] Secondly, the defendants assert that the recent act entirely transforms the function of the reserve fund by making it available for a variety of programs other than operating subsidies. The essence of both arguments is that the proviso indicates that the Secretary has discretion to refrain from implementing the operating subsidies program and hence affords a basis for vacating the December and May orders and dissolving the preliminary injunction.

I. *Contract Authority*

The defendants' first contention is a renewal of an argument presented at the time of the December ruling. The Secretary's position is that she requires "contract authority" before she may implement the operating subsidies program; that the existing contract authority is limited in amount and is insufficient to fund all the programs established by Section 236; that she possesses the discretion to allocate the existing contract authority among the several 236 housing programs; and that she has reasonably concluded to allocate the existing contract authority to other 236 programs instead of the operating subsidies program.[8]

The premise of this argument is that the reserve fund can be spent only pursuant to contract. In my earlier consideration of this issue, I reviewed the statutory language and the legislative history and concluded that "direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority."[9] However, the defendants now argue that the proviso of Public Law 94–378, which states that the reserve fund shall be available "for the payments on contracts entered into pursuant to the authorities enumerated above," supports their position that the reserve fund can only be spent pursuant to contract authority.

[1] The defendants place too much weight upon the proviso's reference to contracts. The language merely recognizes that many of the programs enumerated in Public Law 94–378, including interest reduction payments under the Section 236 program, do require the obligation of contract authority prior to the expenditure of appropriations. However, I conclude that the proviso does not indicate that the reserve fund can *only* be spent pursuant to contract.

There is a second response to the defendants' contract authority argument. In Part IV of the December opinion, I dealt with the possibility that the reserve fund can be spent only pursuant to contract and that the disbursements are subject to the Secretary's allocation of contract authority. While I recognized that such a construction would give the Secretary some discretion, I held that a decision not to implement the program would be contrary to Congressional intent and would constitute an unreasonable exercise of that discretion.[10] Thus, even if the proviso did indicate that the reserve fund can only be spent pursuant to contract, this would not provide a basis for vacating the earlier orders or for dissolving the preliminary injunction.

II. *Transformation of the Reserve Fund*

An important factor underlying the December ruling was the special funding method for the operating subsidies

program. At that time, the reserve fund established by subsection (g) was to be used solely for additional assistance payments under the program. The defendants now argue that the proviso in Public Law 94–378 transforms the function of this reserve fund by giving the Secretary authority to utilize it for a variety of enumerated programs. The contention is that Congress' failure to establish priorities concerning the expenditure of the fund indicates that the Secretary has discretion over its allocation and, therefore, that she is no longer under a mandatory duty to make additional assistance payments directly from the reserve fund. This argument necessitates a study of the legislative intent behind the proviso.

In June 1976, the House Appropriations Committee proposed an appropriation of $2,975,000,000 for payments for subsidized housing programs. This sum was $95,000,000 less than the budget request. The reduction was based in part on the making available of the money in the reserve fund for a variety of programs other than the operating subsidies program of Section 236.[11] This intent was manifested in the proviso of Public Law 94–378.

In the Senate, Senator Sparkman introduced an amendment which deleted the proviso. In support of this deletion, he stated:

> "[T]he Housing Act of 1974 specifically authorized that section 236 funds returned to HUD as excess charges should be used to assist section 236 projects which face financial difficulties, because of increased taxes and utility costs. HUD has failed to carry out this provision despite the specific legislative authority conferred 2 years ago, despite the fact that almost $25 million in excess charges have been returned to HUD, and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision.
>
> . . .
>
> "Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time

several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized under section 236(g)."[12]

Senator Proxmire, floor manager for the bill, concurred with Senator Sparkman.

"I think it is a very good amendment. It is most important that we do our very best to keep the section 236 tax and utility subsidy program going. It is a good program. It is for low-income people.

"All we are asking, as I understand it, is that the money be kept in the program and not distributed elsewhere."[13]

[2] Following these comments, the Senate passed the amendment deleting the proviso. However, the final bill reported by the Conference Committee of the House and the Senate contained the House's proviso. The Conference Report explained the Committee's action as follows:

"Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under Section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.

"The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area."[14] (Emphasis added).

The legislative history makes it clear that the proviso enables the Secretary to use the 236(g) reserve fund for other than Section 236 programs. However, it also makes clear that Congress did not intend to allow the Secretary to fail to implement the operating subsidies program. The statements of Senators Sparkman and Proxmire are to this effect, as is the statement in the Conference Report that its action "shall not prejudice any suit . . . in this area." Therefore, I conclude that there is no basis for altering my holding that the Secretary is under a mandatory duty to implement the operating subsidies program.

[3] I do recognize, however, that the proviso authorizes the Secretary to use the fund for purposes other than 236 programs after October 1, 1976 (the effective date of Public Law 94–378). To the extent my earlier orders and the preliminary injunction are inconsistent with this fact, it is hereby modified. Thus, the Secretary, in her discretion, is free to spend the Section 236(g) funds on other programs after October 1. However, that portion of the fund necessary to maintain a *full* operating subsidies program in Connecticut[15] must be so allocated. Only in this way will the relief granted by my earlier orders not be "prejudiced."[16]

For the foregoing reasons the defendants' Motion to Vacate the Order and Dissolve the Preliminary Injunction is denied.

SO ORDERED.

ENDNOTES

1. This section amended Section 236 of the National Housing Act, 12 U.S.C. § 1715z–1 (Supp. IV, 1974) *amending* 12 U.S.C. § 1715z–1 (1970). The program provides for the payment of operating subsidies to certain housing projects assisted under Section 236 and may be found at 12 U.S.C. § 1715z–1(f)(3) and (g) (Supp. IV, 1974). *See* notes 5 and 6 *infra*.

2. 405 F.Supp. 1277 (D.Conn.1975). That opinion contains a more exhaustive treatment of the factual background and statutory scheme involved in these actions.

3. On May 20, 1976, a similar nationwide class was certified by Judge Pratt in *Underwood v. Hills*, D.C., 414 F.Supp. 526. However, that class was amended to exclude the Connecticut statewide class on June 7, 1976.

4. Pub.L. No. 94–378 (Aug. 9, 1976) provides in relevant part:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the following sums are appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * * * * *

HOUSING PAYMENTS

For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z, 1715z–1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 633), $2,975,000,000: *Provided, That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.*" (Emphasis added to proviso).

5. 12 U.S.C. § 1715z–1(f)(3) provides:

"For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community."

6. 12 U.S.C. § 1715z–1(g) provides:

"The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974."

7. Federal Defendants' Memorandum in Support of Motion To Vacate Order and Dissolve Preliminary Injunction ("Memo in Support") at 4.

8. Memo in Support, at 2.

9. 405 F.Supp. at 1287 & n. 46. This conclusion was based in part upon the language of (f)(3) which authorizes the Secretary "*to make,* and contract to make, additional assistance payments . . ." (emphasis added), and in part on the availability of resources in the reserve fund established by (g).

10. 405 F.Supp. at 1288–92.

11. H.R.Rep. No. 94–1220, 94 Cong., 2d Sess. 7 (1976).

12. 122 Cong.Rec. S 10775 (daily ed. June 26, 1976).

13. *Id.*

14. H.R.Rep. No. 94–1362, 94 Cong., 2d Sess. (1976). 122 Cong.Rec. H 7685.

15. On August 31, 1976, Circuit Judges Robb and Wilkey of the United States Court of Appeals for the District of Columbia denied defendants' motion for a stay of the district court's order pending appeal in *Underwood v. Hills.* In so ruling, Judges Robb and Wilkey considered the impact of Public Law 94–378 on that litigation and concluded that "the district court's order does not preclude the Secretary from using the reserve fund to fund programs other than the operating subsidy program, 12 U.S.C. § 1715z–1(f)(3), to the extent such other funding is authorized in Public Law 94–378." My present ruling reaches a similar result. However, I add that such other payments can be made only if the Secretary's allocation does not "prejudice" the relief granted to plaintiffs in this action.

16. The present ruling is not intended to dispose of the plaintiffs' motion for clarification of my earlier orders. That separate motion is still pending decision. The present ruling is concerned only with the impact of Public Law 94–378 on the relief granted in these actions.

UNITED STATES COURT OF APPEALS

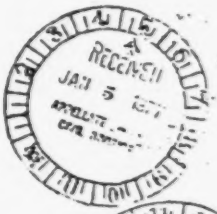
Second Circuit

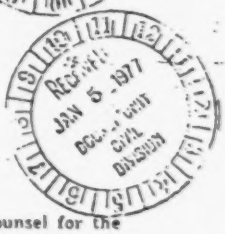
At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth 27th day of December , one thousand nine hundred and seventy-six

VERNICE DUDOSE, et al.,
Plaintiffs-Appellees,
v.
CARLA HILLS, et al.,
Defendants-Appellants.

CLAUDIA WALTER, et al.,
Plaintiffs-Appellees,
v.
CARLA HILLS, et al.,
Defendants-Appellants.

JANETTE LITTLE, et al.,
Plaintiffs-Appellees,
v.
CARLA HILLS, et al.,
Defendants-Appellants.





It is hereby ordered that the motion made herein by counsel for the

appellant/ ~~appellee~~ ~~petitioner~~ ~~respondent~~ Carla A. Hills, Secretary of the Department of Housing and Urban Development

by notice of motion dated November 8, 1976, for a stay pending appeal,

be and it hereby is granted. ~~denied~~

It is further ordered that this stay shall remain in effect until such time as the stay granted by the Supreme Court in Hills, et al. v. Underwood, et al., A-259, 45 U.S.L.W. 3305 (October 18, 1976) is terminated.

A-1

12-17-976

Circuit Judges

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III. OPINION IN COMPANION CASE

Myrna UNDERWOOD, Sheila Fazande, Annie Johnson, Jerome Smith, Cora Ewers, Frances Jardin, Lura R. Stentz, Charlotte West, Aritisha McGee, individually and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

Samuel R. PIERCE, Jr., Secretary of Housing and Urban Development, Defendant-Appellant.

No. 83–5773.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Nov. 8, 1983.

Decided May 23, 1985.

In action brought by low income tenants challenging refusal of Secretary of Housing and Urban Development to implement subsidy program authorized by National Housing Act, the United States District Court for the Central District of California, 547 F.Supp. 256, Harry Pregerson, Circuit Judge, sitting by designation, awarded plaintiffs' attorneys fees under the Equal Access to Justice Act. On appeal, the Court of Appeals held that: (1) settlement agreement did not foreclose recovery under EAJA for legal expenses for litigation and settlement administration; (2) district court did not abuse its discretion in finding that Secretary's position was not substantially justified; (3) district court's determination that special circumstances did not require denial of award was not an abuse of discretion; (4) district court did not abuse its discretion in concluding that hourly rates requested were appropriate and reasonable under EAJA; and (5) a multiplier may not be applied to fees awarded under EAJA.

Affirmed in part and reversed in part.

Mary S. Burdick, Western Center of Law and Poverty, Inc., Los Angeles, Cal., for plaintiffs-appellees.

James R. Madison, Orrick, Herrington & Sutcliffe, San Francisco, Cal., amicus curiae.

Sheila Lieber, Robert Greenspan, Merril Hirsh, Attys., U.S. Dept. of Justice, Washington, D.C., for defendant-appellant.

Appeal from the United States District Court For the Central District of California.

Before HUG and FLETCHER, Circuit Judges, and CARROLL,* District Judge.

PER CURIAM:

This case requires us to consider the calculation of awards of attorneys' fees under the Equal Access to Justice Act. The Secretary of Housing and Urban Development was ordered to pay $1,129,450 to the attorneys representing low income tenants in a class action against the Secretary. The fee award calculation included time for services performed in litigating the case and time spent by the attorneys in administering a settlement agreement.

We hold that the plaintiff class is entitled to a feeaward for its attorneys' litigation and settlement administration services. We also hold that ordering payment of fees at a rate in excess of $75 per hour was not an abuse of discretion on these facts. Finally, we hold that Congress did not intend to authorize the use of a multiplier to compound awards granted under the Equal Access to Justice Act.

* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

I

FACTS

This action was brought by tenants of government-subsidized housing to challenge the refusal of the Secretary of Housing and Urban Development to implement a subsidy program authorized by the National Housing Act, 12 U.S.C. § 1715z–1 (1982). The Act authorized the Secretary to make payments to owners of government-subsidized apartment houses to cover increased costs for utilities and local taxes. The purpose of the payments was to prevent the shifting of those costs to low income tenants through rent increases. As provided by 12 U.S.C. § 1715z–1(g), the Secretary had accumulated a rental reserve fund to finance the operating subsidies. However, he had refused to distribute that fund.

Underwood brought this action in the District of Columbia as a class action on behalf of all persons nationwide who reside or had resided in apartments subsidized under 12 U.S.C. § 1715z–1. That district court granted a summary judgment for the class and entered a permanent injunction and writ of mandamus requiring the Secretary to disburse the operating subsidy fund. *See Underwood v. Hills,* 414 F.Supp. 526, 532 (D.D.C.1976), *aff'd, Hills v. Underwood,* 429 U.S. 892, 97 S.Ct. 250, 50 L.Ed.2d 175 (1976).

The Supreme Court granted a stay of mandate. It also granted certiorari in two cases raising identical claims, *Ross v. Community Services, Inc.,* 544 F.2d 514 (4th Cir.1976), *cert. granted sub nom., Harris v. Ross,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977), *remanded for consideration of settlement,* 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978), and *Abrams v. Hill,* 547 F.2d 1062 (9th Cir. 1976), *cert. granted sub nom., Harris v. Abrams,* 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977), *remanded for consideration of settlement,* 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978). Prior to hearing before the Court, the parties in *Ross, Abrams,* and the instant case entered into a settlement agreement. It was agreed that the Secretary would deposit $60 million with an escrow agent to create a

settlement fund. The fund was to be distributed to owners of housing subsidized under the Act or directly to tenants in those projects where rents had been increased because no operating subsidy had been received. Price Waterhouse & Co. in Los Angeles contracted to distribute the fund, and Underwood's counsel was designated lead counsel for the settlement administration. Because these appointments focused the settlement activities in Los Angeles, the District of Columbia court transferred the case to the Central District of California.

After execution of the settlement agreement had begun under the district court's supervision, Congress enacted the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1982). Underwood sought an award under EAJA to compensate her attorneys for time spent in litigating the initial action and in supervising the distribution of the settlement fund. The district court concluded that Underwood was entitled to fees under EAJA as the prevailing party in an action brought against the United States. The court determined that Underwood's attorneys had provided 3,304 hours of service and applied an hourly rate ranging from $80 to $120, based on the prevailing market rates in the year the service was performed and the individual attorney's expertise. This resulted in a lodestar figure of $322,700, to which a multiplier of three-and-one-half was applied. The resulting award to Underwood was $1,129,450.

On appeal, the Secretary challenges both Underwood's entitlement to an award and the district court's calculation of the award. We are required to determine the following issues: (1) Did the settlement agreement preclude a fee award? (2) Was the Secretary's position substantially justified? (3) Do special circumstances make the award unjust? (4) Did the district court err in calculating the award? (5) Did Congress intend that a multiplier be applied to awards granted under EAJA?

II

EFFECT OF SETTLEMENT AGREEMENT

The Secretary claims that in entering into the settlement agreement, Underwood waived all claims for fees and is therefore barred from asserting a statutory claim. He relies on three provisions of the agreement:

(1) Section 3, which governs distribution of the fund, provides in subsection (f): "None of the sums distributed may be used to pay attorney's fees";

(2) Subsection 3(e) provides for the return to the Secretary of "any money which remains after all claims are paid"; and

(3) Section 4 of the agreement, which governs the mechanics of distribution, assigns certain costs of administration to HUD in subsection (d). It concludes that "distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD."

The Secretary contends these three provisions, read together, demonstrate a clear intent to draw no attorneys' fees from the settlement fund. Because the fund was the only possible source of fees when the agreement was signed, he reads the agreement as Underwood's promise to relinquish all claims to fees.

The district court interpreted the agreement as precluding the payment of fees from the settlement fund. *Underwood v. Pierce,* 547 F.Supp. 256, 262 (C.D.Cal.1982). It determined that Underwood's attorneys intended to waive such fees because "[w]hen the settlement was negotiated the common fund/common benefit doctrine provided the only realistic basis for a fee award, which plaintiffs' counsel agreed to forego since that could have reduced the amounts paid to low-income class members." *Id.* at 263. The court found, however, that the parties had no intent to preclude the possibility of a recovery of fees under EAJA. *Id.*

[1] The district court's interpretation of the settlement agreement presents a question of law subject to *de novo* review. *In re U.S. Financial Securities Litigation*, 729 F.2d 628, 631–32 (9th Cir.1984).

[2] The first two settlement agreement terms on which the Secretary relies—sections 3(e) and 3(f) of the agreement—do not support his contention. Those sections merely indicate that no fees may be paid from the settlement fund itself. The two provisions are thus entirely consistent with the district court's findings that Underwood's attorneys had no intention of depleting the fund, but that the parties did not foreclose an award from sources outside the fund.

Nor does section 4(d) of the agreement in any way preclude an award of attorneys' fees. Attorneys' fees were dealt with exclusively in section 3(f) of the agreement. Reading the agreement as a whole, it is plain that section 4(d) was not intended to address the question of the availability of attorneys' fees at all, but was rather concerned with miscellaneous "housekeeping" expenses. We therefore conclude that the Secretary has failed to establish that the parties intended to waive all attorneys' fees attendant to the administration of the settlement agreement.

We agree with the district court that the agreement does not foreclose recovery under EAJA for legal expenses for litigation and settlement administration.

III

SUBSTANTIAL JUSTIFICATION

[3–5] Section 2412(d)(1)(A) requires the district court to award fees unless it finds the position of the United States was substantially justified. To evaluate the government's position, we consider the totality of the circumstances present prior to and during litigation. *Timms v. United States*, 742 F.2d 489, 492 (9th Cir.1984); *Rawlings v. Heckler*, 725

F.2d 1192, 1196 (9th Cir.1984). The government must demonstrate that its position had a reasonable basis both in law and in fact. *Timms,* 742 F.2d at 492; *Wolverton v. Heckler,* 726 F.2d 580, 583 (9th Cir.1984). We review, for an abuse of discretion, the district court's determination that the government's position was not substantially justified. *United States v. First National Bank of Circle,* 732 F.2d 1444, 1446 (9th Cir.1984); *Rawlings,* 725 F.2d at 1196.

[6] The district court found that the Secretary's position was not substantially justified because tenants of subsidized housing had brought numerous previous actions to require disbursement of the operating subsidy funds and in each the district court had held that payment of the subsidies was mandatory under 12 U.S.C. § 1715z–1. 547 F.Supp. at 257 & n. 1. We agree that these prior adverse decisions are relevant to the substantial justification question. *See Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250–51 (9th Cir.1984); *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark,* 720 F.2d 1475, 1481 (9th Cir.1983), *cert. denied,* — U.S. —, 105 S.Ct. 446, 83 L.Ed.2d 372 (1984); *Hoang Ha v. Schweiker,* 707 F.2d 1104, 1106 (9th Cir.1983). We are not persuaded by the Secretary's contention that the earlier rulings were only "non-final district court decisions" that mandated no change in his policies. Numerous courts in different districts had agreed with the tenants' contentions. The Secretary was thus put on clear notice that his position was without legal basis, but he continued to litigate the issue.

The Secretary also suggests that the Supreme Court, by granting a stay in this case and certiorari in two related cases, virtually certified that his position was substantially justified. We are reluctant to speculate as to the Court's intent in issuing those orders. We observe, however, that they are susceptible to interpretations other than those advanced by the Secretary. First, if the cases are considered in historical perspective, the Court may have granted certiorari to consider the broad question of the executive's power to impound funds, rather than the narrow issue of the meaning of 12 U.S.C. § 1715z–1. Second, the Court may

have acted in sympathy with the low-income tenants who were forced to bring numerous successive actions to enforce their rights under section 1715z–1. *See Underwood v. Pierce,* 547 F.Supp. at 262. We also note that the Secretary's insistence that the Court's orders justified his position is undermined by the fact that, following entry of those orders, he entered into a settlement granting the plaintiffs all the relief they had requested. *See Dubose,* 579 F.Supp. 937 at 951 (1984).

More significantly, the decision of the District of Columbia court on the merits of this matter establishes that the Secretary had no reasonable basis in law to ignore the mandates of section 1715z–1. *See Underwood v. Hills,* 414 F.Supp. at 531; *see also Dubose,* 579 F.Supp. at 950 (Secretary's position in refusing to disburse operating subsidies "unreasonable" and "had no justifiable basis.")

We hold that the district court did not abuse its discretion in finding that the Secretary's position was not substantially justified.

IV

SPECIAL CIRCUMSTANCES

[7] EAJA directs the district court to deny fees if "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). This provision allows the government to defeat a fee application even if its position is not substantially justified. *See Berman v. Schweiker,* 713 F.2d 1290, 1295 n. 18 (7th Cir.1983). The Secretary argues such special circumstances exist in this case because the parties did not contemplate a fee award when the settlement was negotiated. He contends that imposing an award after the fact constitutes an "extraordinary injustice."

The Secretary bases his argument on *Aho v. Clark,* 608 F.2d 365 (9th Cir.1979). In *Aho,* the district court denied a request for an award of attorneys' fees under 42 U.S.C. § 1988 (1982). The fee request had been filed following the

entry of a consent decree. In determining that the denial was not an abuse of discretion, we relied upon the fact that the consent agreement made no reference to attorneys' fees even though section 1988 had been enacted prior to the parties' approval of the agreement. *Id.* at 367. We also observed that the defendant had begun to take the action demanded by the suit prior to the time it was filed and had manifested no bad faith or obdurate conduct. *Id.* at 367–68.

[8] The facts in this case do not compel a similar result. We have held that the parties did not intend to foreclose the recovery of fees under EAJA. The recovery therefore will not deprive the Secretary of the benefit of his bargain. The district court's determination that special circumstances did not require the denial of an award thus was not an abuse of discretion.

V

CALCULATION OF AWARD

Section 2412(d)(2)(A)(ii) establishes a cap on the hourly rate awardable under EAJA:

> [A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. . . .

The district court concluded that a fee in excess of $75 per hour was warranted in this case because the litigation was complex and protracted and "[f]ew attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by this case." To determine the proper hourly amount, the court applied the factors approved by this court in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). Based on those factors, it found that an appropriate hourly rate for attorney Patricia Tenoso ranged from $85 per hour in 1976 to $120 per hour in 1981 and that an appropriate

hourly rate for attorney Mary Burdick ranged from $80 per hour in 1976 to $120 per hour in 1982. These findings were based on prevailing market rates for those years and on each attorney's experience.

[9] We have recently indicated that the consideration of *Kerr* factors is appropriate in determining the amount of fees to be awarded under the EAJA. *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1251 (9th Cir.1984). *See also Action on Smoking & Health v. Civil Aeronautics Board,* 724 F.2d 211, 218 (D.C.Cir.1984) (factors such as the contingent nature of success, delay in payment, and quality of representation constitute "special factors" under the EAJA). The district court found that an hourly rate of $75 was justified by several special factors, including the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases. The district court did not abuse its discretion in concluding that the hourly rates requested by Western Center—ranging from $80 per hour for work in 1976 to $120 per hour for work in 1982—were appropriate and reasonable under the EAJA.

The Secretary's claim that Underwood is not entitled to fees for services performed prior to October 1, 1981 is without merit. *See Timms v. United States,* 742 F.2d at 493.

VI

USE OF MULTIPLIER

The district court calculated the fee award by multiplying the hours of compensable for each year by that year's hourly rate. It then added the totals for each attorney for each year to derive a lodestar, to which the court finally applied a multiplier. It concluded that "a multiplier of 3.5 properly reflects the contingent nature of this case, its complexity, and, most importantly, the high quality of Western Center's work, and the excellent results achieved."

Section 2412(d) contains no express authorization for the use of a multiplier. Underwood contends that Congress approved the use of a multiplier by its use of the term "special factor" in section 2412(d)(2)(A)(ii). She explains that that term has been used to justify the use of a multiplier for awards made under statutes other than EAJA, including the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1982); Title VII, 42 U.S.C. §§ 2000e *et seq.* (1982); the Rehabilitation Act, 29 U.S.C. § 794 (1982); and the Clayton Act, 15 U.S.C. § 15 (1982).

[10] We do not find Underwood's argument persuasive. Two important distinctions set EAJA apart from all the statutes which Underwood analogizes. The first is that EAJA alone places a specific dollar limit on the hourly rate to be awarded. Because the statutory limit is so precise, we refuse to inflate it by 350% without a stronger indication that Congress intended for us to do so.

[11] Second, unlike the statutes that Underwood uses to illustrate her point, EAJA authorizes an award of fees against the United States. We must consider carefully the scope of the government's waiver of its sovereign immunity. We cannot order an award that has not been "specifically and unequivocally authorized by Congress." *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131, 1132 (9th Cir.1974). There is insufficient indication that Congress intended to expose the United States to compounds of the hourly rate. We therefore hold that a multiplier may not be applied to fees awarded under EAJA.

VII

CONCLUSION

Underwood is entitled to a reasonable attorneys' fee for litigation and settlement administration services performed in this case. Underwood's attorneys are entitled to be compensated at the hourly rate specified by the district court but are not entitled to have a multiplier factor applied to that fee. The appellees are therefore entitled to an attorneys' fee in the amount of $322,700. Each party shall bear its own costs on appeal.

AFFIRMED in part, REVERSED in part.

IV. DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of June one thousand nine hundred and eighty-five.

VERNICE DUBOSE, et al.,
Plaintiff-Appellees/
Cross-Appellants,

v. No. 84-6145, 84-6169, 84-6171

SAMUEL R. PIERCE, JR., et al.,
Defendants-Appellants/
Cross-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiffs-Appellees, Vernice Dubose, et. al.

Upon consideration by the panel that heard the appeal, 40

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

* Judge Winter disqualified himself from this case.

Elaine B. Goldsmith
Clerk

V. RELEVANT STATUTES

The Operating Subsidy
12 U.S. Code § 1715z–1(f),(g)

Establishment of basic and fair market rental charges; rental for dwelling units; separate utility metering; additional assistance payments for low-income tenants; limitations; amounts; establishment, etc., of initial operating expense level of projects.

(f)(1) For each dwelling unit there shall be established with the approval of the Secretary (A) a basic rental charge determined on the basis of operating the project with payments of principal and interest due under a mortgage bearing interest at the rate of 1 per centum per annum; and (B) a fair market rental charge determined on the basis of operating the project with payments of principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage covering the project. The rental for each dwelling unit shall be at the basic rental charge or such greater amount, not exceeding the fair market rental charge, as represents 25 per centum of the tenant's income. With respect to those projects which the Secretary determines have separate utility metering for some or all dwelling units, the Secretary is authorized—

(i) to permit the basic rental charge and the fair market rental charge to be determined on the basis of operating the project without the payment of the cost of utility services used by such dwelling units; and

(ii) to permit the charging of a rental for such dwelling units at such an amount less than 25 per centum of a tenant's income as the Secretary determines represents a proportionate decrease for the utility charges to be paid by such tenant, but in no case shall such rental be lower than 20 per centum of a tenant's income.

(2) With respect to 20 per centum of the dwelling units in any project made subject to a contract under this section after August 22, 1974, the Secretary shall make, and contract to make, additional assistance payments to the project owner on behalf of tenants whose incomes are too low for them to afford the basic rentals (including the amount allowed for utilities in the case of a project with separate utility metering) with 25 per centum of their income. The additional assistance payments authorized by this paragraph with respect to any dwelling unit shall be the amount required to reduce the rental payment (including the amount allowed for utilities in the case of a project with separate utility metering) by the tenant to 25 per centum of the tenant's income. In no case shall such rental payment be reduced below an amount equal to utility costs attributable to the unit occupied by the tenant, unless the Secretary determines that the application of this requirement in any area would result in undue hardship because of unusually high utility costs prevailing seasonally or otherwise in such area. Notwithstanding the foregoing provisions of this paragraph, the Secretary may—

(A) reduce such 20 per centum requirement in the case of any project if he determines that such action is necessary to assure the economic viability of the project; or

(B) increase such 20 per centum requirement in the case of any project if he determines that such action is necessary and feasible in order to assure, insofar as is practicable, that there is in the project a reasonable range in the income levels of tenants, or that such action is to be taken to meet the housing needs of elderly or handicapped families.

(3)(A) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. For each fiscal year prior to

the fiscal year 1979, the Secretary is authorized to make, and shall contract to make to the extent of the moneys in the reserve fund established under subsection (g) of this section and to the further extent of funds authorized in appropriation Acts, an additional monthly assistance payment to the project owner up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level. Such payment shall be used by the project owner solely to effect, and there shall be, a reduction in the basic rental charges established for the project. Any contract to make additional monthly assistance payments shall be for a one-year period and shall be adjusted periodically to provide, to the extent approved in appropriation Acts, for continuation of the payments and for an appropriate adjustment in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph unless the Secretary finds that the increase in the cost of utilities or local property taxes is not reasonable or not comparable to cost increases affecting other rental projects in the community.

(B) The Secretary shall utilize amounts credited to the fund described in subsection (g) of this section on or after October 1, 1978, or credited to such fund prior to October 1, 1978, but remaining unobligated on October 31, 1978, for the sole purpose of carrying out the purposes of section 201 of the Housing and Community Development Amendments of 1978. No payments may be made from such fund unless approved in an appropriation Act. No amount may be so approved for any fiscal year beginning after September 30, 1980.

Collection and deposit of excess rental charges for reserve fund for additional assistance payments

(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section.

EQUAL ACCESS TO JUSTICE ACT
28 U.S. Code § 2412

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency [and] *or* any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency [and] *or* any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sec-

tions 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), *including proceedings for judicial review of agency action,* brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. *Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.*

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed [$1,000,000] *$2,000,000* at the time the civil action was filed, [(ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and] *or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceeed $7,000,000 at the time the civil action was filed, and which had not more than 500 em-*

ployees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity[.];

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest

valuation of the property involved that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

[(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

[(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.]

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards,

the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

Respectfully submitted,

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(3)

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No. 85-516

In the Supreme Court of the United States

OCTOBER TERM, 1985

VERNICE DUBOSE, ET AL., PETITIONERS

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioners challenge the court of appeals' denial of their application for attorneys' fees and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

1. This attorneys' fee dispute arises out of litigation challenging the Secretary of Housing and Urban Development's decision not to implement an "operating subsidy" program, intended to offset rent increases for low-income tenants attributable to higher property taxes and utility costs incurred by project owners. The program was authorized by the Housing and Community Development Act of 1974, 12 U.S.C. (Supp. IV 1980) 1715z-1(f)(3)(A), repealed by the Omnibus Budget and Reconciliation Act of 1981, Pub. L. No. 97-35, § 322(f), 95 Stat. 403. Congress did not provide sufficient contract authority for the Secretary to implement all of the subsidy programs authorized by the

Housing and Community Development Act. Accordingly, Secretary Hills concluded that she had discretion to decline to implement the operating subsidy program at issue here, which she determined to be the least efficient of the various programs authorized by Congress. See Pet. App. 9. In deciding not to implement the operating subsidy program, the Secretary relied on a then-recent decision of the District of Columbia Circuit, *Pennsylvania* v. *Lynn*, 501 F.2d 848 (1974), which held that the Secretary had discretion to refuse to implement a program that would interfere with the nation's housing goals (see Pet. App. 12).

The Secretary's decision not to implement the operating subsidy program spawned a rash of litigation. Several district courts, including the district court in the instant case, and two courts of appeals rejected the Secretary's defense of her decision. See *Dubose* v. *Harris*, 82 F.R.D. 582, 585 (D. Conn. 1979); *Ross* v. *Community Services, Inc.*, 396 F. Supp. 278, subsequent opinion, 405 F. Supp. 831 (D. Md. 1975), aff'd mem., 544 F.2d 514 (4th Cir. 1976) (Table), cert. granted *sub nom. Harris* v. *Ross*, 431 U.S. 928 (1977), remanded for consideration of settlement, 439 U.S. 1001 (1978); *Abrams* v. *Hills*, 415 F. Supp. 550 (C.D. Cal.), aff'd, 547 F.2d 1062 (9th Cir. 1976), cert. granted *sub nom. Harris* v. *Abrams*, 431 U.S. 928 (1977), remanded for consideration of settlement, 439 U.S. 1001 (1978). Upon application of the Secretary, however, this Court stayed the district court's 1976 order in *Underwood* v. *Hills*, 414 F. Supp. 526 (D.D.C.), a nationwide class action, which would have required the Secretary to implement the operating subsidy program. *Hills* v. *Underwood*, 429 U.S. 892 (1976).[1]

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[1]The *Underwood* litigation was subsequently transferred from the United States District Court for the District of Columbia to the United States District Court for the Central District of California. *Underwood* v. *Hills*, No. 76-469 (D.D.C. Apr. 5, 1979).

Following this Court's grant of a stay in *Underwood*, the Second Circuit stayed the order of the district court in the instant case, thus relieving the Secretary of the obligation to implement the operating subsidy program in Connecticut. This Court refused to vacate the Second Circuit's stay. *Dubose* v. *Harris*, 429 U.S. 1085 (1977). In addition, the Court granted the government's petitions for a writ of certiorari in two other operating subsidy cases. *Harris* v. *Abrams*, 431 U.S. 928 (1977); *Harris* v. *Ross*, 431 U.S. 928 (1977).

Before this Court could resolve the merits of the operating subsidy dispute, the parties involved in the various cases reached a comprehensive settlement. Pet. App. 117-143. Under the terms of the settlement, HUD made available a settlement fund of approximately $60 million to reimburse tenants and project owners for their increased costs. *Id.* at 119. The agreement provided that the settlement fund was to be administered by a committee of plaintiffs' counsel, with the cost of settlement administration to be paid partially out of the settlement fund and partially by HUD. *Id.* at 123-124. The settlement agreement further provided that "[i]t is the intent of the parties that distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD" (*id.* at 124); that "[n]one of the sums distributed may be used to pay attorney's fees" (*id.* at 121); and that "any money which remains after [payment of all claims and settlement costs assigned to HUD] * * * shall be returned to HUD and shall be credited to the reserve fund established by Section 236(g) of the National Housing Act, as amended" (*ibid.*).

2. The operating subsidy cases remained at least technically alive pending the conclusion of settlement administration. Pet. App. 129-130. In October 1981, more that two years after the settlement agreement had been signed, the

Equal Access to Justice Act, 28 U.S.C. 2412, took effect. Thereafter, plaintiffs' counsel in several of the operating subsidy cases, including the instant case, moved for attorneys' fees and expenses under subsection (d) of the EAJA.[2] The government opposed the fee applications, principally on the grounds that the Secretary's position in the litigation was "substantially justified," the settlement agreement was intended to preclude any fee awards, and special circumstances unique to the operating subsidy litigation would make attorneys' fee awards unjust.[3]

In the instant case, petitioners' counsel sought a fee award of approximately $1.5 million for their services in the litigation and the administration of the settlement fund. The district court held that they were entitled to an award of fees, rejecting the government's argument that this Court's actions in staying the *Underwood* nationwide injunction and granting the Secretary's petitions for a writ of certiorari in two other operating subsidy cases demonstrated that HUD's position was "substantially justified." Pet. App. 36-41. The district court also rejected the government's alternative argument that the settlement agreement either barred attorneys' fee awards to petitioners' counsel or constituted a "special circumstance" that would make fee awards unjust. *Id.* at 41-42. The district court awarded petitioners' counsel a total of $141,705 in attorneys' fees and expenses. *Id.* at 64-66.

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[2]Section 2412(d) directs a court to award attorneys' fees to a prevailing party in any civil action (other than a tort action) brought by or against the United States unless the court finds that the position of the United States was substantially justified or that special circumstances would make an award unjust.

[3]The government also contended that the operating subsidy cases were not "pending" on the effective date of the EAJA and that the EAJA did not authorize fee awards for work performed prior to its effective date. The district court rejected these arguments (Pet. App. 33-35), and the government did not renew them on appeal.

The government appealed from the district court's ruling that petitioners were entitled to fees, while petitioners took a cross-appeal with respect to the amount of fees. The court of appeals reversed the district court's determination that petitioners were entitled to fees, holding that the government's position had been "substantially justified." Pet. App. 2-18. The court of appeals held that the Secretary had reasonably relied on *Pennsylvania* v. *Lynn, supra*, which the court noted was the "only judicial guidance available" at the time the underlying operating subsidy litigation was commenced. Pet. App. 13. The court also found reasonable the government's consistent determination to seek appellate resolution of the operating subsidy controversy. *Id.* at 14, 15-16. In addition, the court noted that the various stays and grants of review by this Court were "indicative of the courts' view that the government's position was not unreasonable." *Id.* at 16. Finally, the court declined to hold that the government's position lacked substantial justification simply because HUD ultimately decided to settle the dispute, noting that any such holding would have a chilling effect on an agency's willingness to settle future cases. *Id.* at 17.[4]

Less than 10 days after the court of appeals' decision in this case, the Ninth Circuit held that the government's position in the operating subsidy litigation had *not* been "substantially justified," and it affirmed in substantial part a district court award of attorneys' fees under the EAJA. *Underwood* v. *Pierce*, 761 F.2d 1342 (1985), petition for reh'g pending. The Ninth Circuit's decision does not refer to the court of appeals' decision in this case, and, from the timing of the two decisions, we infer that the Ninth Circuit

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[4]In light of the court of appeals' favorable disposition of the government's appeal, the court did not reach the issues presented by petitioners' cross-appeal. Pet. App. 17-18.

was not aware of the Second Circuit's opinion. On July 8, 1985, the government filed a petition for rehearing in *Underwood*, with a suggestion that the case be reheard en banc. To date, the Ninth Circuit has not acted on the petition.

3. Petitioners allege (Pet. 7) that the decision below conflicts with the Ninth Circuit's decision in *Underwood*. We agree that the two decisions are in conflict, and we stressed that fact, among others, in our rehearing petition in *Underwood*. In our view, however, the conflict is not ripe for resolution by this Court. Because of the pendency of the government's rehearing petition in *Underwood*, it remains entirely possible that the conflict in the circuits upon which petitioners rely may disappear. We therefore suggest that the Court should hold the instant petition pending action by the Ninth Circuit on the government's rehearing petition in *Underwood*. When the rehearing petition has been acted upon, we will file a supplemental memorandum in this case, advising the Court of the final disposition of the *Underwood* litigation and of our views on the correct disposition of the instant petition for a writ of certiorari.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held pending the Ninth Circuit's disposition of the government's petition for rehearing in *Underwood* v. *Pierce* and the filing by the government of a supplemental memorandum in this Court.

CHARLES FRIED
Solicitor General

NOVEMBER 1985

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In the Supreme Court of the United States

OCTOBER TERM, 1986

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VERNICE DUBOSE, ET AL., PETITIONERS

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SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-516

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

The petition in this case was filed in September 1985, alleging a conflict between the decision below and *Underwood* v. *Pierce*, 761 F.2d 1342 (1985), modified, 802 F.2d 1107 (9th Cir. 1986), on the availability of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). In our original response to the petition, filed in November 1985, we acknowledged the conflict but indicated that the government had sought rehearing of the Ninth Circuit's *Underwood* decision. We accordingly urged the Court to defer action on this petition pending the disposition of the *Underwood* litigation. The Ninth Circuit denied the government's petition for rehearing in *Underwood* on November 18, 1986. This brief sets forth the government's views on the proper disposition of this case in light of the Ninth Circuit's action in *Underwood*.

STATEMENT

1. This attorneys' fee dispute arises out of a challenge to a decision of the Secretary of Housing and Urban Development (HUD) not to implement an "operating subsidy" program for low-income tenants. The operating subsidy program and the associated litigation are described in the government's original response to the petition for certiorari in this case. Here, we note only that the Secretary's decision spawned a series of lawsuits, including, among others, both this action and a nationwide class action brought in the District of Columbia. See *Underwood* v. *Hills*, 414 F. Supp. 526 (D.D.C. 1976).[1] Although these cases were resolved adversely to the Secretary in district court, both this Court and the Second Circuit issued stays of the district court orders. This Court subsequently granted the government's petitions for writs of certiorari in two other operating subsidy cases. Before the Court could resolve the merits of the operating subsidy dispute, however, the plaintiffs in the various cases and a new Secretary of HUD reached a comprehensive settlement. See *Battles Farm Co.* v. *Pierce*, No. 85-5945 (D.C. Cir. Dec. 12, 1986), slip op. 4.

2. Plaintiffs' counsel in several of the operating subsidy cases, including the instant case, then moved for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Section 2412(d)(1)(A) of that statute provides in pertinent part that a court shall award attorneys' fees to a prevailing party (other than the United States) in any non-tort civil action brought by or against the United States "unless the court finds that the position of the United States was substantially justified."

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[1]The *Underwood* litigation subsequently was transferred from the United States District Court for the District of Columbia to the United States District Court for the Central District of California. *Underwood* v. *Hills*, No. 76-469 (D.D.C. Apr. 5, 1979).

In this case, the Second Circuit rejected petitioners' fee request, holding that "HUD has borne its burden of proving that its litigation position, albeit ultimately unsuccessful, was not unreasonable" (Pet. App. 13). Noting that "[t]he government's position must be evaluated according to the legal justification for its posture throughout the litigation rather than by hindsight after later judicial interpretations of the issues involved" (*ibid.*), the court concluded that "[t]he governing law, to the extent that it existed, did not mandate HUD's surrender early in the litigation" (*id.* at 14). The court also found no evidence that the government's conduct of the litigation "deterred aggrieved tenants from filing suits" (*id.* at 15). And the court noted that the government had not singled out a particular "private party as the victim of an inconsistent interpretation" of the operating subsidy program (*ibid.*).

The court of appeals also found that other factors supported its conclusion. It observed that the stays granted both by this Court and by the Second Circuit seemingly embodied judgments that the government had a reasonable possibility of success (Pet. App. 16), and it noted that "[t]he same is true" of this Court's grants of certiorari (*id.* at 17). Conversely, the court explained that the ~~the~~ government's agreement to a settlement could not be viewed as an admission that its litigation position had been unjustified. The court of appeals reasoned that such an approach "would discourage future settlements," noting that "policy reasons quite apart from the merits of the dispute may, in the last analysis, dictate a premature termination of the litigation." *Ibid.*

3. Fewer than 10 days after the Second Circuit's ruling in this case, the Ninth Circuit held that the government's position in the *Underwood* operating subsidy litigation had *not* been substantially justified, and it therefore sustained an award of attorneys' fees under EAJA. *Underwood* v.

Pierce, 761 F.2d 1342 (1985), modified, 802 F.2d 1107 (1986). In finding an absence of substantial justification, the Ninth Circuit pointed to several considerations. First, it noted that a number of district courts had rejected the Secretary's position, "thus put[ting] [him] on clear notice that his position was without legal basis, but he continued to litigate the issue" (761 F.2d at 1346). The Ninth Circuit also reasoned that the Secretary's decision to settle the litigation on terms that provided the plaintiffs with all the requested relief "undermined" his contention that his legal position was supportable (*ibid.*). Conversely, the Ninth Circuit refused to accord any weight to this Court's stay of the *Underwood* injunction and to its grant of certiorari in two related cases, declining to "speculate as to the Court's intent in issuing those orders" (*ibid.*). And the Ninth Circuit concluded that, in its view of the underlying merits of the dispute, "the Secretary had no reasonable basis in law to ignore the mandates" of the legislation establishing the operating subsidy program (*ibid.*). The Ninth Circuit subsequently denied the government's petition for rehearing.[2]

ARGUMENT

1. In assessing the plaintiffs' claims for attorneys' fees, both the Second Circuit and the Ninth Circuit purported to apply the same general test of substantial justification: "The government must demonstrate that its position had a reasonable basis both in law and in fact" (761 F.2d at 1346; compare Pet. App. 12 (citation omitted) (" 'Where the government can show that its case had a reasonable basis

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[2]Attorneys' fees were requested in two other operating subsidy suits. In *Battles Farm*, the District of Columbia Circuit declined to award fees; the court found it unnecessary to determine whether the government had been substantially justified in failing to implement the subsidy program because the plaintiffs' claims on that issue were inextricably intertwined with their arguments on other claims as to which the government's position plainly was meritorious. Slip op. 8-13. Resolution of the fee request in *Abrams* v. *Pierce*, No. 75-3009-JWC (C.D. Cal.), has been stayed pending final disposition of *Underwood*.

both in law and fact, no award will be made.' ")). That the courts of appeals reached conflicting conclusions in applying this reasonableness test followed, in large part, from a simple but fundamental disagreement about the strength of the Secretary's position in the operating subsidy litigation. A significant factor in the Ninth Circuit's decision to award fees was its view that "the Secretary had no reasonable basis in law to ignore the mandates" of the legislation establishing the operating subsidy program (761 F.2d at 1346). The court below, in contrast, concluded from its review of the litigation that "the government's position appeared at first to be supported by persuasive case law" (Pet. App. 15). This disagreement, which concerns the arguable nature of the government's obligations under a statute that was repealed in 1981, plainly does not, standing alone, warrant this Court's consideration.

There is more to these cases, however, than disagreement about the import of a now-defunct statute. Beyond that narrow issue, the courts of appeals reached contrary conclusions about the relevance of other, more generally applicable factors that bear on the EAJA reasonableness determination. The court below, for example, saw the grant of a stay by a superior court, as well as a grant of certiorari by this Court, "as indicative of the * * * view that the government's position was not unreasonable" (Pet. App. 16; see *id.* at 17). The Ninth Circuit, in contrast, refused to attribute any weight to those actions (761 F.2d at 1346). Conversely, the court below declined to "[s]peculat[e] as to the agency's intent in settling," noting that "reasons quite apart from the merits of the dispute" may lead to a negotiated termination of a lawsuit (Pet. App. 17). The Ninth Circuit took a different approach, finding it relevant to the substantial justification inquiry that the government agreed to settle the litigation (761 F.2d at 1346). And the courts disagreed about the weight to be accorded the district court decisions rejecting

the merits of the government's position in the operating subsidy cases. The Ninth Circuit concluded that those decisions put the Secretary "on clear notice that his position was without legal basis" (*ibid.*), while the court below found it impossible to "say that the tally [of adverse decisions] ever became so onesided as to render HUD's position clearly unjustifiable" (Pet. App. 14).[3]

In our view, this divergence in reasoning and result stems from the vagueness of the statute's "substantially justified" formula, as well as from the open-ended nature of the "reasonableness" standard that the courts have used as a proxy therefor. Like the Ninth Circuit in *Underwood*, the lower courts generally have evinced both an inability and a reluctance to develop clear guidelines—in particular, guidelines making use of objective indicia of reasonableness—to govern the resolution of EAJA disputes. In the absence of such guidelines, the courts have reached seemingly conflicting conclusions in cases that present quite similar issues. Compare, *e.g., Keasler* v. *United States*, 766 F.2d 1227, 1232-1233 (8th Cir. 1985) (government not "substantially justified" in a tax case because the legal issue involved had been resolved adversely to the government in one other circuit), with *Wyandotte Savings Bank* v. *NLRB*, 682 F.2d 119, 120 (6th Cir. 1982) (government "substantially justified" even though the issue already had been adversely settled in the Sixth Circuit because the government's

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[3]On this last point, we note that there were differences in the historical record available to the respective district courts at the time they rendered their decisions in these cases. At the time of the district court's initial decision in the Second Circuit case, on December 15, 1975 (Pet. App. 75-102), only two other district courts had rejected the government's arguments. See *Underwood* v. *Hills*, 414 F. Supp. 526, 531 (D.D.C. 1976) (citing cases). But by June 1976, when the district court in the Ninth Circuit case issued its ruling, the district judge was able to cite ten decisions that had rejected the government's operating subsidy arguments, including the decision in this case. See *ibid.*

argument was "a reasonable attempt to reopen a closed question"). And compare *Herring* v. *United States*, 781 F.2d 119, 122 (8th Cir. 1986) (government liable for fees because, even though its litigating position was reasonable, it should have consented to a prelitigation settlement offer), and *Environmental Defense Fund, Inc.* v. *Watt*, 722 F.2d 1081, 1087 (2d Cir. 1983) (fees awarded because government waited too long to settle), with *Ashburn* v. *United States*, 740 F.2d 843, 846 (11th Cir. 1984) (no liability for fees when the government withdrew its assertedly unreasonable position 11 months after the complaint had been filed). The conflict here, in which two courts reached contrary conclusions on essentially identical facts, is only the sharpest example of this phenomenon.

The absence of firm EAJA guidelines also has led to an enormous proliferation in both the number of EAJA cases and the length and complexity of EAJA litigation. According to figures compiled by the Administrative Office of United States Courts, the federal courts disposed of 657 applications for fees and expenses under EAJA in 1986 alone; 555 (or 84%) of these applications were granted. And because the courts have not been willing to reject (or, for that matter, grant) EAJA fee requests upon a showing of objective indicia indicating that the government's position was (or was not) reasonable—indicia that in the operating subsidy litigation included this Court's grant of a stay and of writs of certiorari—virtually all of those fee requests have led to a duplication of the litigation on the merits, as the courts analyzed for a second time the substance of the government's position.

Having said this, we of course recognize that some duplicative inquiries are made unavoidable by the nature of EAJA's "substantially justified" standard. Fee awards are not automatic under the EAJA, which differs from other fee-shifting statutes in its requirement that courts make an

assessment of the strength of a losing case. But the development of clear rules or presumptions that would reduce the complexity of EAJA litigation surely would be healthy. As Justice Brennan has noted in a related context, "[i]n systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases." *Hensley* v. *Eckerhart*, 461 U.S. 424, 455 (1983) (opinion of Brennan, J.). If the Court believes it possible to develop firm EAJA rules, and if it is inclined to undertake the endeavor, this case would provide a vehicle for doing so.

We note, that both the decision below and the ruling in *Underwood* were issued under the version of EAJA enacted in 1981 (Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2325-2330, partially codified at 28 U.S.C. 2412), which expired by its terms on October 1, 1984.[4] Congress subsequently reenacted EAJA as of August 5, 1985. Pub. L. No. 99-80, 99 Stat. 183 *et seq.* While the reenactment left unchanged the statutory language authorizing an award of fees in the absence of substantial justification (Pub. L. No. 99-80, § 2a, 99 Stat. 184), the accompanying legislative history stated that the test for substantial justification "must be more than mere reasonableness." H.R. Rep. 99-120, 99th Cong., 1st Sess. 9 (1985). Despite this statement, we believe that the 1985 reenactment of EAJA, which did not alter the text of the statute in any relevant way, should not be read to modify the test for "substantial justification" that had been applied by virtually all courts prior to 1985.[5] Most courts in

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[4]The statute continued to authorize awards of fees in cases (such as these) that were pending on the expiration date. Pub. L. No. 96-481, § 204(c), 94 Stat. 2329.

[5]In awarding fees under EAJA prior to 1985, 11 courts of appeals (including, obviously, the Second and Ninth Circuits) "agree[d] that the test for determining whether the government's position was 'substantially justified' [was] one of reasonableness." *United States* v. *Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985) (citing cases). The only court to apply a

fact have continued to apply a reasonableness standard in decisions post-dating the 1985 legislation.[6] But the Court might find it appropriate to consider the significance of the 1985 reenactment in a case where its meaning had been considered and addressed by the court of appeals.[7]

3. Finally, we note that the Solicitor General has authorized the filing of a petition for a writ of certiorari in *Underwood*, which now is due to be filed on or before

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semantically different standard was the District of Columbia Circuit, which required the government to demonstrate that its position was "slightly more" than reasonable. *Spencer* v. *NLRB*, 712 F.2d 539, 558 (1983), cert. denied, 466 U.S. 936 (1984).

[6]One court, finding the 1985 legislative history "conflicting and inconclusive," has expressly held that the governing standard remains one of reasonableness. *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1288-1289 (5th Cir. 1985). Several other courts of appeals have continued to apply the reasonableness standard without discussion of the 1985 legislative history. See *League of Women Voters* v. *FCC*, 798 F.2d 1255, 1257 (9th Cir. 1986); *Fulton* v. *Heckler*, 784 F.2d 348, 349 (10th Cir. 1986); *United States* v. *Kemper Money Market Fund, Inc.*, 781 F.2d 1268, 1274, 1276 (7th Cir. 1986); *Herring* v. *United States*, 781 F.2d 119, 121 (8th Cir. 1986) (government is substantially justified when its position is "not unreasonable"); *Yoffe*, 775 F.2d at 449. Cf. *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1497 (11th Cir. 1986) (leaving it unclear whether the standard is one of "reasonableness" or "more than mere reasonableness"). The Federal Circuit, however, has read "[t]he legislative history of the 1985 amendments [to] indicate[] that substantial justification means more than mere reasonableness on the part of the government," so that the government must show "that it was *clearly* reasonable in asserting its position." *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986) (en banc) (emphasis in original; footnotes omitted). The District of Columbia Circuit has adhered to its prior view that the government's position must be "slightly more than reasonable" (*Battles Farm Co.*, slip op. 7 n.11), although it has expressed skepticism that there is any meaningful distinction between its standard and one of simple reasonableness (*ibid.*).

[7]Although the petition in this case was filed in September 1985, after the reenactment of EAJA, petitioners do not argue that the 1985 legislation affected the applicable standard.

March 18, 1987. In addition to the substantial justification question that is presented here, the petition in *Underwood* will raise a second significant EAJA issue—when attorneys' fees may be awarded at rates that exceed the statutory limit of $75 per hour. See 28 U.S.C. 2412(d)(2)(A).[8] If the Court concludes that the substantial justification question warrants review, consideration of that question in *Underwood* rather than in this case accordingly might permit adjudication of a fuller range of issues. We therefore suggest that the Court hold the petition here for consideration along with the forthcoming petition in *Underwood*.

CONCLUSION

The petition for a writ of certiorari should be held for consideration along with the petition to be filed in *Pierce* v. *Underwood*.

Respectfully submitted.

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Solicitor General

FEBRUARY 1987

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[8]Section 2412(d)(2)(A) was not affected by the 1985 EAJA amendments.